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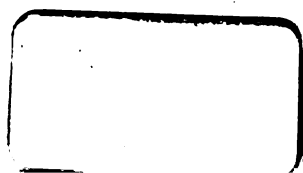
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JSN
JAH
REX

v.243

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas,

WITH

A TABLE OF THE NAMES OF CASES

AND

DIGEST OF THE PRINCIPAL MATTERS.



BY

WILLIAM HODGES, ESQ. OF THE INNER TEMPLE,
BARRISTER AT LAW.



VOL. II.

FROM EASTER TERM, SIXTH WILL. IV. 1836, *
TO MICHAELMAS TERM, SEVENTH WILL. IV. 1836,
BOTH INCLUSIVE.



LONDON:

HENRY BUTTERWORTH,

Law Bookseller and Publisher,

7, FLEET STREET,

AND RICHARD PHENEY, 69, CHANCERY LANE.

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J U D G E S
OF THE
COURT OF COMMON PLEAS,

During the Period of these Reports.

The Right Hon. Sir N. C. TINDAL, Knt., C. J.

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir STEPHEN GASELEE, Knt.

The Right Hon. Sir J. B. BOSANQUET, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt.



ATTORNEY GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS

IN

Easter Term, 1836.

CLARKE *v.* STOCKEN.

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April 23rd.

R. ALEXANDER obtained a rule *nisi* to show cause why a judge's order to revoke a submission to arbitration should not be set aside. The submission to arbitration had been by rule of Court; and after the arbitrator had heard the evidence, the defendant's attorney finding that the arbitrator's opinion, upon a point of law, was against his client, applied to a judge without giving notice to the other side; and by great importunity induced him to revoke the submission (a).

A judge is not empowered under 3 & 4 W. 4, c. 42, s. 39, to order a submission to arbitration to be revoked, upon an *ex-parte* application.

R. V. Richards shewed cause. It may be assumed that if the learned judge had not been satisfied with the grounds which were urged in support of the application, he would not have revoked the submission. The Statute 3 & 4 W. 4, c. 42, s. 39, affords sufficient authority to enable a judge to act upon an *ex-parte* statement; and if it were not so, the other side might keep out of the way until the award was made, and then the provisions of the statute would be altogether nugatory. A defendant is held to bail in an action of trover, or he is arrested a second time for the same debt, by judge's orders, which

(a) 3 & 4 W. 4, c. 42, sec. 39; "And whereas it is expedient to render references to arbitration more effectual; be it further enacted, that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of *nisi prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his majesty's courts of record, shall not be revocable by any party to such

reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award."

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are granted on *ex-parte* applications. [Tindal, C. J.—That is not always the case; sometimes a summons is issued, and both parties are heard]. No fraud is imputed; the judge having exercised his discretion, the revocation is complete, and the authority of the arbitrator cannot be restored.

Alexander, contra, was stopped by the Court.

TINDAL, C. J.—The only question before us is, whether this order should be set aside, and I am of opinion that the rule should be made absolute. By the *thirty-ninth* section of the statute, a submission can now only be revoked by the leave of the Court, or by leave of a judge; and the section ought to be construed *secundum subjectam materiem*. If an application were made to the Court, a rule *nisi* only would be granted, and the other side would be heard before it was made absolute. So, also, if the application is made to a judge at chambers, both parties ought to appear before any order is made. Here it was made on an *ex-parte* application, and it is the same as if the submission had never been revoked, and the arbitrator has still authority to make his award.

PARK, J.—We have been asked to act in opposition to one of the first principles of justice, which requires that both parties shall be heard, or at least, be summoned that they may be heard, before any decision is pronounced. It is not because the Act of Parliament authorizes a judge to revoke the submission, that it can therefore be done without hearing both parties. The practice as to arresting defendants is not applicable to this case. It is then sometimes necessary to proceed without notice, to prevent debtors from making their escape.

VAUGHAN, J.—I am of the same opinion. The *thirty-ninth* section of the statute is highly beneficial, because it was formerly the practice for parties to revoke the authority of the arbitrator, if they discovered an unfavourable expression of his opinion during the proceedings. It was desirable to take away this power of revocation from the parties, and to place it in the hands of the Court or of a judge; but I am of opinion that the order ought not in any case to be made on an *ex-parte* application.

BOSANQUET, J.—I am of opinion that the authority given by the statute should not be exercised without notice being given to the other party. It is admitted that the former grievances required a remedy, but all the evils would be restored if a revocation could be obtained upon an *ex-parte* statement.

It is said that there would be danger in giving notice, but that is not so, for if the arbitrator acted corruptly his award would be set aside.

Rule absolute.

MELIN v. TAYLOR.

Com. Pleas.

April 20th.

WILDE, Serjt., applied for a rule *nisi* for a new trial in this cause, upon two grounds:—First, that the verdict was against evidence; and secondly, for misdirection. The action was for criminal conversation with the plaintiff's wife; it was tried before Lord *Denman*, C. J., at the last *York* assizes, when a verdict was found for the defendant.

Where inadmissible evidence was received without objection, and the judge in summing up, made strong observations upon its effect:—*Held*, not to amount to a misdirection.

The defendant called witnesses to show that during the period that the adulterous intercourse was suspected, he was living upon terms of affection and harmony with his own wife, and the plaintiff's counsel offered no objection to the reception of this evidence. The learned judge, in giving his charge to the jury, said he was of opinion that the evidence so offered was not receivable; but that as it had been admitted without objection, he was of opinion that it raised a great obstacle to the plaintiff's case, as he thought it was entitled to considerable weight in favor of the defendant.

In support of the latter part of the rule it was contended, that this topic, eloquently urged to the jury, amounted to a misdirection; and that evidence which was so irrelevant as not to be receivable at all if objected to, was not entitled to any consideration whatever.

TINDAL, C. J.—The plaintiff is not entitled to have a new trial on the ground of misdirection. The effect of this evidence was stated by the learned judge as it occurred to him at the time, and the observations do not amount to a misdirection in point of law.

PARK, J.—This evidence having been admitted, I do not see how the learned judge could have omitted to remark upon it. The observations do not amount to a misdirection, and some judges may be more eloquent than others, but I never heard that stated as being a ground for granting a new trial.

VAUGHAN, J., agreed.

BOSANQUET, J.—It is not usual to grant a new trial for misdirection upon the ground that the observations of the judge were more or less strong. (a)

Rule refused.

(a) See also *Simpson v. Clayton*, 1 *Hodges*, 464.

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May 3rd.

LEWIS v. BRIGGS.

The Court refused to compel an attorney to shew letters written to him by his client, in order to enable the latter to prosecute an action for negligence; and the client was left to bring trover to recover an order for a piece of plate, which he had intended to present to the attorney, and which was in his possession.

TALFOURD, Serjt, applied for a rule to show cause why the defendant, who was an attorney, should not shew the plaintiff several letters which the plaintiff had written to him; and also deliver up an order for a piece of plate which he had received from the plaintiff. The facts of the case were these:—the defendant had been the plaintiff's attorney; and in order to induce the attorney to expedite certain professional business, the plaintiff had given him the order upon a silversmith, which would enable him to obtain a piece of plate of the value of 50*l.* at the plaintiff's expense. The letters were required to enable the plaintiff to prosecute an action for negligence which he had commenced against the defendant. [*Tindal*, C. J.—Can you cite any authority in support of this application?] There is no similar case in the books; but this differs from ordinary cases, because the defendant was acting as the plaintiff's attorney when the letters were written.

TINDAL, C. J.—The production of the letters by the defendant is a matter of good feeling, upon which he must exercise his own discretion. As to the order for the piece of plate, the plaintiff may bring an action of trover, if he attaches any value to it.

PARK, J., and **VAUGHAN**, J., concurred.

BOSANQUET, J.—The defendant does not hold these letters as a trustee.

Rule refused.

April 29th.

HOLLIS v. FREER and others.

A feme sole replevied her goods, which had been distrained, and afterwards married: the defendants removed the proceedings out of the Sheriff's Court by *re. fa. lo.*, and the original writ was issued in the name of the feme sole:—*Held*, that the coverture was a good plea in abatement of the writ.

REPLEVIN for taking the goods of the plaintiff, one *Hannah Hollis*, at *Silver Hill*, in the county of *Stafford*. The defendants, by their plea, prayed judgment of the original writ, "because they say that the plaintiff, before and at the time of the suing forth of the original writ in this behalf, was and still is married to one *John Osborne*, then and yet her husband, who is still living, and this the said defendants were ready to verify; wherefore, because the said *J. Osborne* is not named in the said original writ, the said defendants pray judgment of the original writ, and that the same may be quashed." The defendants then avowed the taking the distress for rent due from the plaintiff.

The plaintiff replied that the suit was commenced by plaint, and without any writ in the county court of the sheriff of the county of *Stafford*; and that after the same was so commenced as aforesaid, and while it was pending in that court, the said defendants, for the purpose of removing the same therefrom into the court of our lord the king before the justices of our said king of the bench, issued and prosecuted a certain writ of our said lord the king, being the writ in the said plea mentioned, called a *recordari facias loquelam*, to the tenor and effect following, that is to say,

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"William the Fourth, &c., to the sheriff of *Staffordshire*, greeting. We command you that in your full county you cause the plaint to be recorded, which is in the same county, without our writ, between *Hannah Hollis* and *W. H. Freer*, &c., of the cattle, goods, and chattels of the said *Hannah* taken and unjustly detained." (Here the remainder of the writ was set out.)

Demurrer and joinder in demurrer.

Addison, in support of the demurrer.—The plea of the defendants cannot be resisted. In *Milner v. Milnes* (a), it was held, that an action of trespass for an injury done to the property of the wife *dum sola* must be brought by the husband and wife; and it also appears, that if such an action be brought by the wife alone, the defendant must plead the coverture in abatement and not in bar; and *Morgan v. Painter* (b) shows that it is immaterial whether the plaintiff take husband before suing out the writ, or after suing out the writ and before declaration.

R. V. Richards, contrà.—Here the plaint was levied in the sheriff's court, and the replevin-bond was given by the plaintiff in her own name, and her marriage did not take place until after the commencement of the proceedings. If the plaintiff had discontinued the action, she would have forfeited the bond. The defendants sued out the writ of *re. fa. lo.*, and that distinguishes this case from *Morgan v. Painter* (b); for the Court will not permit the defendants to object to their own proceedings. The general rule is laid down in *Bac. Abr.*, tit. *Abatement*, G.:—"If an action be brought in an inferior court against a *feme sole*, and, pending the suit, she intermarries, and afterwards removes the cause by *habeas corpus*, and the plaintiff declares against her as a *feme sole*, she may plead coverture at the time of suing the *habeas corpus*, because the proceedings here are *de novo*, and the Court takes no notice of what was precedent to the *habeas corpus*; but upon motion on the return of the *habeas corpus*, the Court will grant a *procedendo*: for though this be a writ of right, yet where it is to abate a rightful suit, the Court may refuse it; and the plaintiff had bail below to this suit, which by this contrivance he is ousted of, and possibly, by the same means, of the debt;" and in a note it is added, "But if she remove the plaint, coverture is not a good plea," citing *Barnes*, 355. Here the plaint was removed by the defendants, and the case from *Barnes* is not, therefore, in point.

Addison, in reply, contended that the authorities cited for the plaintiff were rather in favour of the defendants.

TINDAL, C. J.—Our judgment must be governed by the case of *Morgan v. Painter* (b). The parties, when brought here by a writ of *recordari facias loquelam*, are like a plaintiff and defendant in a new cause; and when the original writ is sued out, it is subject to be abated by the ordinary causes, one of which is, where the plaintiff being a *feme sole*, marries after the writ, and before declaration. It is said that the removal of the proceedings into this

(a) 3 T. Rep. 627.

(b) 6 T. Rep. 265.

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court by the defendants, puts the plaintiff in a worse situation than she was in before. That may be so; but I am not quite satisfied, if the plaintiff had sued out a new writ in the name of herself and her husband, that the condition of the replevin-bond would have been broken.

The other judges concurred.

Judgment for defendants.

April 22nd.

GREEN v. COBDEN.

1. By the 57 G. 3, c. 99, s. 26, a monition from the bishop, requiring an incumbent to reside in his benefice, is directed to be served in a particular manner; and by a subsequent section it is directed, that in all cases where proceedings are directed by monition, such monition being "duly served," shall be returned into the registry of the bishop's court:—*Held*, that, no explanation being given of the meaning of the words "duly served," the mode of service pointed out in the case of a monition to reside, was applicable to the service of a monition issued in pursuance of the statute, for the purpose of levying the salary of a curate by sequestration.

2. The statute directed the service of a monition to

REPLEVIN. At the trial before *Littledale, J.*, at the last assizes for *Sussex*, a verdict was found for the avowant, subject to the opinion of this Court upon a special case which stated the following facts.

The Rev. *William Kilwick*, rector of *Westbourne*, granted an annuity upon his glebe land to the defendant, and the payments being in arrear, the defendant entered into possession under the annuity-deed, and let the lands to the plaintiff, who paid him rent for the same until *Michaelmas*, 1831. The distress which was the subject of the action was made by the defendant to recover the rent which became due at *Michaelmas*, 1832. The plaintiff's plea in bar stated that, before the distress was made, the said *William Kilwick* had appointed *George Augustus Howe* to be the curate of the said parish, and that the Lord Bishop of *Chichester* duly licensed the said *George Augustus Howe*, and assigned to him the yearly stipend of 75*l.*; that arrears of the said stipend were due, and that the Bishop of *Chichester* issued his monition, thereby peremptorily monishing the said *William Kilwick* to pay all arrears of the said stipend, and that the said monition was duly served on the said *William Kilwick*; and that afterwards, no sufficient cause being shown, the bishop, by his writ, sequestered the ecclesiastical emoluments of the said vicarage, and authorized the said *George Augustus Howe* to levy and receive the same; and that the said plaintiff was thereupon required by the said *George Augustus Howe*, and threatened to be compelled to pay to him as sequestrator as aforesaid the arrear of rent in the avowry mentioned; and that, in order to prevent his being compelled to pay the said arrear of rent, before the said distress, the plaintiff paid the same to the said *George Augustus Howe*. The defendant replied that the monition was not duly served upon the said *William Kilwick* (a).

(a) Stat. 57 G. 3, c. 99, sec. 26, enacts, That in every case in which it shall appear to the bishop that any spiritual person having or holding any benefice, and not being licensed according to this act to be absent therefrom, nor having any lawful cause of absence therefrom, does not sufficiently reside on the same respectively, it shall be lawful for such bishop to issue, or cause to be issued, a monition to such spiritual per-

son forthwith to reside therein, and perform the duties, &c., and to make a return to such monition within a certain number of days after the issuing thereof, so that in every such case there shall be thirty days between the time of delivering such monition to such spiritual person, or leaving the same at his then usual or last place of abode, or if not there to be found, with the officiating minister or one of the church-

be by delivery to the incumbent, or by leaving it at his then usual or last place of abode, or if not there to be found, with the officiating minister or one of the churchwardens, and also by delivering a copy thereof at the house of residence belonging to the benefice. The incumbent was last in the parish in 1831, when he resided in the vicarage-house; his subsequent residence was unknown, but his daughter remained in the parish; and the officiating minister being himself the sequestrator, it was *held*, that the delivery of a copy of the monition at the vicarage-house was a sufficient service within the meaning of the statute.

The case then set forth the following statement of the service of the monition:—
“Thomas Baker was clerk of the parish of *Boslam*, and lived in the parish; the last time he saw *Mr. Kilwick*, the vicar, at the vicarage-house, was at *Michaelmas*, 1831, but he had been absent before that; that was the house where he resided when he came to the parish. His daughter lived in the vicarage-house before he went away and after he went away; she afterwards went into lodgings, and lived in a lodging about 100 yards from the vicarage-house, where a copy of the monition was served; and she lived at the vicarage-house at the time of the trial of the cause. *Mr. Kilwick* never kept a servant; his daughter was his servant; a servant girl used to wait on her. About a week before the monition was served, *Mr. Howe*, who had been some years curate of the parish, directed *Baker* to make inquiries of *Miss Kilwick* where her father was. *Baker* did so, but could get no information from her; and he, *Baker*, did not know where *Mr. Kilwick* was. About a week after that, *Baker* was directed by *Mr. Howe* to serve a copy of the monition, and to lay it in the vicarage-house. He took it accordingly to the vicarage-house on the 31st of *January*, 1832, and laid it on the mantel-place in the front parlour, which was the room that *Mr. Kilwick* generally abided in when he was in the parish. He put it there that *Mr. Kilwick* or his daughter might see it if they came there. The front door of the house was open, and nobody let *Baker* in. He could not say whether there were any chairs or tables in the room. A fisherman's family were in the house, and they occupied the back parlour. *Baker* did not go again to see if it had been taken by any body. On the same day that *Baker* served the monition, he made a memorandum as follows:—‘*Tuesday, January 31st, 1832, at three o'clock in the afternoon, I delivered the duplicate of this monition at the vicarage house of this parish; witness my hand.*’ The sequestration was read in the church, and stuck up at the church door, on the 10th of *April*, 1832.”

The question for the opinion of the Court was, whether the monition had been duly served on *W. Kilwick*. If the Court were of opinion that the monition had been duly served, the verdict which was found for the avowant was to be set aside, and a verdict for *4l. 4s.* to be entered for the plaintiff; but if the Court was of a contrary opinion, the verdict for the avowant was to stand.

wardens, and also a copy thereof at the house of residence, if any such there be, belonging to such benefice.

Section 53 enacts, That it shall be lawful for the bishop, and he is hereby required, subject to the several restrictions, &c. to appoint to every curate such salary as is allowed and specified in this act; and every licence to be granted to a stipendiary curate under this act shall contain and specify the amount of the salary allowed by the bishop to the curate; such licence, or any copy of the registry thereof, signed by the registrar of the diocese or his deputy, shall be evidence of the amount of the salary so appointed to any curate, in all courts of law or equity; and in case any difference shall arise between any rector or vicar, or person holding any benefice, and his curate, touching such stipend or allowance, or the payment thereof, or the arrears thereof, the bishop, on complaint to him made, may and shall summarily hear and determine the

same; and in case of wilful neglect or refusal to pay such stipend, salary, or allowance, or the arrears thereof, he shall be and is hereby empowered to proceed by monition and sequestration to sequester the profits of the benefice for and until payment of such stipend or allowance, or the arrears thereof.

Sec. 75.—That in all cases where proceedings under this act are directed by monition and sequestration, such monition shall issue under the hand and seal of the bishop, and being duly served, shall be returned, with a certificate of service, into the registry consistorial court of such bishop, and thereupon it shall be competent to the party mentioned to show cause, by affidavit or otherwise, as the case may require, against the sequestration issuing, and unless sufficient cause be shown to the contrary, the sequestration shall issue under the seal of the said consistorial court.

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W. H. Watson.—The service of the monition is in the form required by the *twenty-sixth* section of 57 G. 3, c. 99, for the vicarage-house was the last place of the incumbent's abode. No information could be obtained from the daughter as to any other place of abode which her father then had; and the fact of her subsequent return to the vicarage shows that the possession of it was not abandoned. At all events the third mode of service pointed out in the statute has been followed, as the sequestrator had himself the original monition, and a copy was left at the house of residence belonging to the benefice. The *seventy-fifth* section empowers the bishop to issue a writ of sequestration after the monition shall be certified to be *duly served*; and the fact of the issuing of the writ clearly shows that the Ecclesiastical Court was satisfied that there had been a legal service of the monition. That being so, this Court will not now interfere, for it is not inconsistent with the principles of justice, to suppose that a monition, when left at the domicile of the vicar, is a due service, according to the practice of the Ecclesiastical Court. The Court cannot, therefore, say that the service is so contrary to natural justice as to render the proceedings void, as was held by Lord Tenterden, C. J., in *Becquet v. M'Carthy* (b). The same principle is to be found in *Buchanan v. Rucker* (c), and *Douglas v. Forrest* (d). If it were necessary to show that the service was according to the practice of the Ecclesiastical Court, the books of authority upon that subject prove that the proceedings have been strictly regular. 2 *Burn's Eccl. Law*, title, *Citation*, 218; ib. 48. *Gibson's Codes*, 1003, 2nd ed.

Platt, contrâ.—The precedents in the ecclesiastical courts should have been given in evidence, to show that this citation was duly served. The cases cited are not applicable, because they relate to the acknowledgments of the judgments of foreign courts. The object of a monition is to bring notice to the party that proceedings are taken against him. In *Capel v. Child* (e), the Court refused to enforce the proceedings, because the party had not an opportunity of being heard. Here the incumbent had not been in the parish since 1831, and therefore the same objection arises. The plaintiff and defendant, both claim in hostility to the vicar; and if this were the common case of an ejectment between immediate parties, such a service of the declaration in ejectment would be insufficient.

As to the statute, the *twenty-sixth* section only applies to cases of non-residence; and the directions there given, are not applicable to proceedings taken under the *fifty-third* section.

TINDAL, C. J.—This question comes before us on a precise issue which is raised upon the record, namely, whether this monition was duly served on *Wm. Kilwick*? We may arrive at a decision without entering into many of the arguments which have been advanced; for it seems to me, that it depends entirely upon the construction of the statute. I will first refer to the *seventy-fifth* section (f).—[His lordship read the section.]

It is, therefore, a condition precedent, that the monition shall be duly served before the issuing of sequestration. Now, the *twenty-sixth* section directs the mode in which a monition, requiring a spiritual person to reside on his benefice, shall be served; and if we find the statute condescending to point out a parti-

(b) 2 B. & Ado. 959
 (c) 9 East, 192.
 (d) 4 Bing. 686.

(e) 2 Cr. & J. 558.
 (f) See *ante*, p. 7.

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cular mode of service, I can see no reason, upon principle, why the same mode of service should not be adopted in all cases of monition and sequestration, especially as we find, in the *seventy-fifth* section, that, in *all cases* where proceedings under the act are directed by monition and sequestration, such monition, *being duly served*, shall be returned, with a certificate of service, into the Bishop's Court; at least, some good reason should be shown why this construction should not be adopted. Then the *twenty-sixth* section points out three distinct modes by which the monition may be served: first, by actual delivery of the monition to the incumbent: secondly, by leaving it at his then usual or last place of abode; or, thirdly, if he is not to be found, by leaving the monition with the officiating minister or the churchwarden, and a copy of it at the house of residence belonging to the benefice. It is not pretended, that there was any actual delivery of the monition; and it may be somewhat difficult to say that the vicarage-house was the incumbent's then usual or last place of abode. However, as there is no evidence that he had any other place of abode, I am not prepared to say that the service has not been sufficiently brought within the second mode of service which the statute points out; but that the third species of service has been complied with, I have no doubt. There is evidence that the incumbent could not be found, for his daughter was applied to by the clerk, and she could give no information as to where her father was. The clerk was therefore driven to the house, where he left a copy of the monition. And as Mr. *Howe*, the officiating minister, is the sequestrator and the person who delivers the copy to the clerk, a copy could not be delivered to the officiating minister. The evidence clearly shows that this was a vicarage, and that the incumbent resided in the house when he was in the parish, and also that his daughter resided there, at the time of the trial, which shows that the possession was not abandoned. Under these circumstances, why are we to say that the vicarage is not the house of residence belonging to the benefice?

I am therefore of opinion, that the mode of service, required by the act of Parliament, has been complied with, and our judgment must be for the plaintiff.

PARK, J.—A clergyman is required to reside on his benefice, and the statute directs a monition to be left at his usual or last place of abode; and I am of opinion that the vicarage-house must be taken, in the present case, to be the usual place of abode of Mr. *Kilwick*. He resided in the house when he was last seen in the parish, in 1831; and there is no evidence that he had any other place of abode. That seems to me to be sufficient. But in a subsequent part of the clause it is said, that if the party cannot be found there, that the monition shall be left with the officiating minister, or one of the churchwardens, and also a copy thereof be left at the house of residence belonging to the benefice. Now it appears that, although there were persons residing at the house, there was a room which they did not occupy; and it might fairly be presumed that the vicar would return. What then was to be done? The officiating minister, being himself the sequestrator, had the original monition in his possession, and delivered a copy to the clerk, who left it at the house of residence belonging to the benefice. I am therefore of opinion that the monition has been duly served.

VAUGHAN, J.—Upon this occasion we have not been assisted by civilians

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who are conversant with the practice of serving monitions; but I think that the form of service, required by the statute, has been complied with as nearly as the circumstances of the case would permit. Personal service of the monition was out of the question; and the officiating minister being the sequestrator, he had the original in his possession, and he delivered a copy to the clerk, who left it at the vicarage-house. I should have been better satisfied, if the monition had been left with one of the churchwardens; but, under the circumstances, I agree that the service was sufficient.

BOSANQUET, J.—I am of opinion that the monition was duly served in pursuance of the *seventy-fifth* section of the statute. That section speaks of the monition being “duly served;” but no explanation being given as to the meaning of these words, we are warranted in interpreting the statute by itself, by calling in aid the *twenty-sixth* section, which speaks of various modes of serving a monition to require residence. There could be no personal service in this case; but I am disposed to think that the vicarage-house was the last place of the incumbent’s abode. He had resided there when he was last in the parish, and no other residence could be found. But as the incumbent was absent, the monition was properly in the hands of the officiating minister, and a copy was left at the vicarage-house; therefore the third mode of service, pointed out by the statute, was undoubtedly followed.

Judgment for the plaintiff.

MEGGS v. BINNS.

April 21st.

The Court will not compel an attorney to repay his client a sum of money expended by him in consequence of the attorney’s alleged negligence, unless the negligence be clearly and unequivocally established.

WILDE, Serjt. obtained a rule, calling upon the plaintiff’s late attorney, to shew cause why he should not repay the plaintiff a sum of 9*l.* 6*s.* 6*d.*, which the plaintiff had been compelled to pay, under the following circumstances:—The plaintiff engaged the attorney to take proceedings against the defendant, to recover a sum of money, and, on the 5th of *September*, 1835, a *capias* was sued out, and the writ was lodged at the sheriff’s office, in *Southampton*, with instructions that the defendant should be arrested. The writ was not enforced; but, on the 20th of *October*, the defendant took out a summons before a judge at chambers, which was attended by the plaintiff’s attorney, and the judge made an order, which directed that all further proceedings should be stayed, on payment of the debt and costs. The plaintiff’s attorney, on the evening of the same day that this order was made, communicated with the under-sheriff by letter, and requested to know the amount of his costs, and he received an answer from the under-sheriff by return of post.

On the 4th *Nov.*, the defendant was arrested under the *capias*, and it appearing that the debt and costs had been paid on *Saturday*, the 31st *Oct.*, a judge at chambers ordered the bail-bond, which had been given to the sheriff, to be cancelled, and that the plaintiff should pay the defendant the costs incurred by reason of the arrest. The above-mentioned sum of 9*l.* 6*s.* 6*d.* was the amount of the costs which the plaintiff had been thus compelled to pay.

Kelly shewed cause.—The plaintiff’s attorney was not guilty of any negligence. If there were negligence, it lay with the under-sheriff, or rather with

the defendant himself, who ought to have taken care that the writ was countermanded, *Scheibel v. Fairbain* (a), where it is said, by *Eyre, C. J.*, "The plaintiff ought not to have trusted to a countermand of the writ by the defendants, but to have obtained it for himself by his own diligence. It appears that the plaintiff has been the occasion of all the inconvenience which he has suffered, for having made it necessary, in the first place, by his neglect to pay a just debt, that the writ should be sued out; he did not prevent its consequences, by taking the countermand into his own hands." Nor could the defendant have been entitled to bring an action to recover damages, sustained by reason of the arrest. *Gibson v. Charters*, (b), *Page v. Wiple* (c), *Silver-sides v. Bowley* (d).

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Rompas, Serjt., in support of the rule.—The cases cited are not in point with the present; for they were decided as between the plaintiff and defendant in the action. Here, in consequence of the negligence of the attorney, in not countermanding the writ, his client has been compelled to pay a sum of money. By the judge's order, the proceedings were stayed; and it was the duty of the plaintiff's attorney to take care that the order was not disobeyed.

TINDAL, C. J.—We must see that there has been some gross negligence on the part of the attorney, to induce us to interfere in this summary manner. If any doubt exists on this point, the plaintiff must bring the question before a jury. We think there is no such clear evidence of negligence in this case.

The action was commenced by a bailable writ, which was issued in *September*, and a considerable time having elapsed before it was executed, the defendant, on the 20th of *October*, took out a summons for an order, to stay proceedings, on payment of the debt and costs. An order to this effect was accordingly made; but the proceedings were not stayed on the making of the order, but on the payment of the debt and costs. The question is, whether any thing occurred afterwards which clearly proves negligence on the part of the plaintiff's attorney. Now the costs were not paid until the 31st of *October*; the writ had already been placed in the hands of the sheriff, and the attorney wrote, on the 20th of *October*, to ascertain the amount of the under-sheriff's costs. The plaintiff's attorney could not know at that time whether the defendant would pay the debt and costs, and therefore he was not bound to request the under-sheriff not to arrest the defendant; for the proceedings taken before the judge might have been a mere stratagem to delay the plaintiff. The debt and costs being paid on the 31st of *October*, it does not appear that the attorney knew who the officer was who held the warrant; and the 1st of *November* falling on a *Sunday*, if the attorney had written to the under-sheriff on the 2nd of *November*, who could say that, under such circumstances, the writ could be countermanded before the 4th of *November*?

There is, therefore, no such clear negligence shown, as to entitle the plaintiff to this summary remedy; he may take the case to a jury, if he chooses to do so, but I doubt whether he would succeed in obtaining a verdict. It was an easy matter for the defendant to have asked for a protection from arrest, which he might himself have sent to the under-sheriff. After the order was

(a) 1 Bos. & P. 383.
(b) 2 Bos. & P. 129.
(c) 3 East, 314.

(d) 1 B. Moore, 92. See also *Lewis v. Norris*, 2 Cr. & M. 712.

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made, neither the plaintiff or his attorney took any step; and if there was any negligence, the defendant was himself, at least, a sharer in it.

The other judges concurred.

Rule discharged, with costs.

April 27th.

POWELL v. HORTON.

A contract was made for the sale of a certain quantity of "*Scott & Co.'s mess pork*," and it appeared by the evidence of mercantile men that *Scott & Co.* were accustomed to prepare and manufacture pork of a superior quality, which ensured it a premium in the market: *Held*, that the warranty was not satisfied by supplying pork which had merely passed through the hands of *Scott & Co.* as consignors, and which bore their brand-mark; but that it meant pork of their manufacture: *Held*, also, that the evidence of the mercantile men was properly received.

CASE. The declaration stated, that on, &c., in consideration that the plaintiff, at the request of the defendant, would buy of defendant a certain quantity, to wit, seventy-five barrels of pork, at 53s. per barrel, payable by bill at three months, less three months discount, and fourteen days for delivery: defendant promised plaintiff that the said quantity of pork was then pork of a certain description, kind, and quality, to wit, mess pork of *Scott and Co.* Averment, that the plaintiff, relying on the said promise of the defendant, did then buy the said quantity of pork of the defendant, upon the terms aforesaid, and then paid him for the same at the rate and in manner aforesaid; and that the said quantity of pork was afterwards, to wit, at the expiration of the said period of fourteen days, delivered by the defendant to the plaintiff, yet the defendant, contriving and fraudulently intending to injure the plaintiff, did not perform or regard the said promise so by the defendant made as aforesaid, but thereby craftily and subtilly defrauded the plaintiff in this, to wit, that the quantity of pork so sold and delivered as aforesaid, was not, at the time of such promise or delivery, of the description, kind, and quality aforesaid, but, on the contrary thereof, was other pork, of a different and inferior description, kind, and quality,—that is to say, unmessed, and not pork of *Scott and Co.*, and worth less to plaintiff by a large sum of money, to wit, the sum of 100*l.*, than the like quantity of pork of the description, kind, and quality, promised by the defendant, as aforesaid, would have been; whereby the plaintiff had not only lost and been deprived of the benefit and advantage which might and otherwise would have accrued to him from the said purchase and from the possession of such quantity of pork of the description, kind, and quality, promised by the defendant as aforesaid, but also, relying on the defendant's promise, had been put fruitlessly and without advantage to a great expense amounting in the whole to a large sum of money, to wit, &c., in and about the receiving, warehousing, and keeping the said pork, and in and about the endeavouring to sell and dispose of the same.

Pleas—First, non assumpsit; secondly, that the pork so delivered to the plaintiff, was mess pork of *Scott and Co.*; conclusion to the country, and issue joined on both pleas.

At the trial before *Tindal, C. J.*, at the *London* sittings after *Trinity Term*, the following facts were in evidence:—the defendant, who was an Irish provision merchant, sold the plaintiff seventy-five barrels of pork, and the following sold note was made out by the factor who transacted the bargain on behalf of the defendant—" *London, 15 August, 1834. Sold Mr. H. Powell, for account of Mr. B. Horton, Scott & Co.'s seventy-five barrels of mess pork, at 53s. per barrel, ex Vine, payable by bills at three months, less three months*

discount and 14 days for a delivery." The seventy-five barrels was a parcel of a consignment of pork from Messrs. *Scott & Co.*; and the plaintiff's clerk was shown all the barrels, and took a sample of the article before the contract was made, and the factor said he could not offer it as *prime* mess pork. After the pork was delivered, it proved, on examination, to be of an inferior quality to the sample, and the plaintiff ascertained that the seventy-five barrels were not prepared or manufactured by *Scott & Co.*, but that they were only the consignors of the pork; and although the brand of *Scott & Co.* was upon the barrels, there was also a brand of the letter W, which was the mark of the manufacturer of the pork, from whom Messrs. *Scott & Co.* had received it. It was proved that *Scott & Co.* were accustomed to prepare pork for the market, and that in consequence of their pork being cut and packed in a particular manner, it fetched a premium of 2s. 6d. per barrel. Two brokers were examined, after objection being made to their evidence by the defendant's counsel, who stated that they should have understood the contract to mean that the pork which was sold was of *Scott & Co.*'s manufacture, and not merely that it had passed through their hands.

The plaintiff had apprised the defendant of the inferiority of the pork on the 5th of *September*, and requested him to take it back again, and a correspondence took place between the parties with a view to effect an arrangement of the dispute; but, in *November*, the plaintiff sold the pork by auction, and the pork-market having in the mean time fallen, and the pork becoming of a worse quality by the delay, a loss of 70*l.* was sustained, being the difference between the cost price, and the price obtained on the resale. The learned judge said he was of opinion that the meaning of the contract was that the pork was to be of *Scott & Co.*'s manufacture; the jury found a verdict for the plaintiff, damages 70*l.* subject to leave reserved to the defendant's counsel to move for a nonsuit, or new trial, or to reduce the damages to the amount of 2s. 6d. per barrel.

Creswell having obtained a rule *nisi* accordingly,

Bompas, Serjt., shewed cause.—This was a warranty that the pork should be of the manufacture of *Scott & Co.* In the case of *Shepherd v. Kain* (a), where an advertisement for the sale of a ship, described her as a copper-fastened vessel, adding that the vessel was to be taken with all faults without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened: it was held that, notwithstanding the words with all faults, &c., the vendor was liable for a breach of the warranty; and it was said, by the Court, "that all faults must mean with all faults that it may have, consistently with its being the thing described." The circumstance of a sample having been shewn to the plaintiff's clerk, does not make any difference. *Jones v. Bowden* (b) is a stronger case than the present upon that point. In *Gardiner v. Gray*, (c) where a sample of silk had been shown, Lord *Ellenborough*, C. J. said, "The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity. I am of opinion, however, that, under such circumstances, the purchaser has a right to expect a saleable article answering to description in the contract." Here the plaintiff was entitled to receive pork

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(a) 5 B. & Ald. 400.

(b) 4 Taunt. 847.

(c) 4 Camp. 144.

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of the manufacture of *Scott and Co.*, which was of more value in the market than other pork of a similar description. The evidence clearly establishes this to be the true meaning of the contract, and it was not satisfied by the delivery of pork which had merely passed through the hands of *Scott & Co.* as factors. The brand of *Scott & Co.* being on the barrels is an additional fact to shew that it was held out that the article was of their manufacture. As to the objection that the resale was delayed for too long a period, the answer is, that the jury have found it took place within a reasonable time; and they came to that conclusion, because, whilst the correspondence was going on, it was supposed that an arrangement would have been effected, and that a sale of the goods would not be necessary.

Creswell and Wightman contra. This question must be determined upon the state of the pleadings, and the defendant has proved the issue taken on the second plea, viz. that the pork delivered to the plaintiff, was mess pork of *Scott and Co.*

The issue is not whether the article was of the manufacture of *Scott and Co.*, but whether it *bond fide* came out of their custody, bearing their brand. The evidence has completely established that it did; and a factor cannot be supposed to give a warranty that articles are manufactured by the parties whose brands are affixed to them. Such a rule would bear very hard upon factors in the transaction of their business. [*Bosanquet, J.* If I buy a gross of *Bramah's* locks, am I not entitled to receive locks of his manufacture?] If *Bramah* had adopted other locks as his own, the contract, as between the buyer and the factor, would be satisfied by the delivery of such locks, especially if the buyer had an opportunity of inspecting them. So here, *Scott and Co.* by affixing their brand to the barrels, adopted the article and sent it out to the world as *Scott & Co.'s* pork. The pork was not sold as being prime mess pork, and the badness of the quality of the article would not give the plaintiff any right of action. It could not be imported into the contract that the defendant warranted the pork to be of the manufacture of *Scott & Co.*, and the evidence which was received was inadmissible, for no general usage of trade was proved; but witnesses merely expressed opinions as to the articles which they should have expected to receive, under such a contract. The subject of warranties was much discussed in *Gray v. Cox*, (d) and the rule which is there laid down, by Lord *Tenterden, C. J.*, is, that if a person sells a commodity, for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose; so here, the pork which was purchased reasonably answered the description given of it as mess pork of *Scott and Co.* *Jones v. Bowden* (e) was a case in which fraud was an ingredient. No case goes further than that in importing a warranty into a contract, and *Gibbs, J.* differed from the rest of the Court, which depreciates its value as an authority.

As to the amount of damages, the plaintiff was bound to have proceeded to a resale as soon as he discovered the defect, and at all events more than 2s. 6d. per barrel ought not to be allowed.

TINDAL, C. J.—I think this rule cannot be supported. This is an action on a warranty on a contract of a sale of a quantity of pork, and the contract stated in the declaration is that the defendant sold the pork as mess pork of

(d) 4 B. & Cres. 115.

(e) 4 Taunt. 853.

Scott & Co.; the breach assigned is that it was pork of an inferior description, and not pork of *Scott & Co.*, and a precise issue is raised upon this averment. The question is what is the meaning of this warranty? Both parties use the same words in making the contract, but they differ in the meaning which should be attached to them; and in such cases either the Court, or a jury, must determine what in their judgment is the true construction of the contract. In the case before us, the plaintiff says that the meaning of the contract was that he was to buy pork of the manufacture of *Scott & Co.*; on the other hand the defendant contends that the warranty was satisfied by supplying pork which came from their warehouse.

It was proved that a commodity called *Scott & Co.*'s pork was known in the market; and a broker stated that he knew the brands which distinguished pork manufactured by *Scott & Co.*, from such as had merely passed through their hands; he said that the brand of *Scott & Co.* without the letter W denoted that the pork was of their manufacture: and the brand with the addition of the W shewed that it only came from their warehouse. Now this witness could not have drawn this distinction if pork manufactured by *Scott & Co.* had not been well known in the market; and it is admitted that a commodity called *Scott & Co.*'s pork bore a premium of 2s. 6d. per barrel, in consequence of its being cut and sorted in a particular manner. Under such circumstances I should think that, without explanation, a warranty that the pork should be *Scott & Co.*'s pork, would mean that it was pork manufactured by them. But, admitting the question to be left in doubt, then this must be treated like all other mercantile contracts: and if a doubt exists as to their true construction, the usual practice is to call persons, who are conversant with the usages of trade, to state their opinion, as to the true import of the words used in the contract. In this case witnesses were called, who stated in the most unequivocal terms that they should consider the expression "*Scott & Co.*'s pork," to mean pork which was of their manufacture. It is true that the declaration goes on to state that the pork was of an inferior description, and of less value than pork of the description promised by the defendant; but it would be too much to say that because the plaintiff complains of the consequences of the breach of a contract, that he therefore gives up the meaning which he attaches to the contract. If a person bought a picture, stated to be by a celebrated artist, the contract would not be satisfied by supplying a picture which had merely hung in the artist's study; and if an agreement were made to buy *Bramah's* locks, the purchaser would require that they should be of *Bramah's* manufacture. So here the plaintiff was entitled under his contract to demand pork which was manufactured by *Scott & Co.*

As to the amount of the damages it is said that the pork was kept too long by the plaintiff before it was resold, but it appears that a reference was agreed upon between the parties, and that from the 5th of *September* until the 24th of *October*, the plaintiff had reason to suppose that the dispute would be arranged. Under these circumstances I am not prepared to say that the delay was unreasonable.

PARK, J.—The declaration alleges that the pork which was purchased was to be of a certain description, namely, mess pork of *Scott and Co.*, and the plea is, that the pork which was delivered to the plaintiff was mess pork of *Scott and Co.* It has been contended that it was not the meaning of the

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contract, that the pork should be of the manufacture of *Scott and Co.*; but it is a fact well known, that provisions which are exported from *Ireland* differ considerably in value, according to the reputation of the brands which are affixed to the articles. In this case I am of opinion that it was the meaning of the contract, not that *Scott & Co.* were the mere consignors of the pork which was sold, but that they were the manufacturers of it. But we will assume that this was an ambiguous contract, upon which it was proper to receive the evidence of mercantile men; then the defendant's counsel, by objecting to the admissibility of such evidence, and objecting, at the same time, to the construction put upon the contract by the judge, do in fact reject the decision of both the judge and the jury, and then appeal to this court. It is clear that somebody must decide, and whether the decision properly belongs to the judge or the jury, the question is determined in favor of the plaintiff. Then it is said that as there was an inspection of the goods, the defendant is thereby exonerated, but *Gardiner v. Grey (b)*, is an express authority upon that point; there it was held, that if at the time of sale, a sample of the goods is exhibited to the buyer, if there be a written contract which gives the goods a particular description, that such is not a sale by sample, but there is an implied warranty that they shall be of a quality of the denomination mentioned in the contract. This case has been happily illustrated in the instances which have been put, of *Bramah* locks, or the pictures of a particular artist, and I almost wish that the rule had not been granted.

VAUGHAN J.—The question is, what is the proper construction of this contract? I think parol evidence was admissible to shew its true meaning, for although, in *Yates v. Pym (c)*, evidence was held inadmissible to shew the meaning of the words "prime singed bacon," it has always been received to shew in what sense mercantile terms are used. The evidence was all on one side, and I think the jury have adopted the true construction of this contract; and the warranty being also proved to be broken, the plaintiff is entitled to retain his verdict.

BOSANQUET, J.—It is a fair and reasonable construction of this contract to say, that pork of *Scott and Co.* means pork which was manufactured by them. If a literary work by a particular author is spoken of, it is implied that it was written by that author; so if a work of art is sold, and the name of the artist is stated, the party making the representation is bound by it. It has been contended, by the defendant's counsel, that, by the terms of the contract, it must be understood that *Scott and Co.* were the mere consignors of the article which was sold; but I cannot see why this construction should be adopted, and the evidence of the mercantile men who were examined, was all on one side.

As to the damages, the plaintiff offered to return the goods, but the defendant refused to receive them, and they were then resold within a reasonable time; and as the warranty is proved to have been broken, the fair measure of damages is the difference between the price of the goods at which they were purchased, and that for which they were subsequently resold.

Rule discharged.

(b) 4 Camp. 144.

(c) 6 Taunt. 466.

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SHACKELL v. ROSIER.

April 22.

CASE. The plaintiff declared that before and at the time of the making of the promise and undertaking of the defendant, as thereafter mentioned, the plaintiff, and *Thomas Arrowsmith*, since deceased, were the proprietors and publishers of a certain newspaper, called the *John Bull*, and, being such proprietors and publishers, they, at the solicitation and request of the defendant, had theretofore, to wit, on, &c., published in the said newspaper, a certain statement and paragraph as follows; that is to say, "*Verily, the Whigs select choice subjects for the exercise of His Majesty's grace. A few weeks since the town was astonished at the respite from death of two men who had been found guilty of a murder under circumstances of peculiar atrocity: it was then suggested that the respite was granted to court the favour of the mobocracy of Lambeth, as Lord Palmerston had then some intention of standing for that borough. In the Times of Friday is the following from a correspondent:—Mr. Charmers, who was convicted of forgery at the sessions of May last, at the Old Bailey, has received His Majesty's most gracious pardon. The case was reserved by the Court over several sessions, for the opinion of the judges on various points of law, which were ultimately decided against him, and he was at length sentenced to be transported for life. Sentence having been passed, the case became fit to be recognised by the secretary of state on the merits; and the result of the investigation is, that Mr. Charmers has received a pardon, under the great seal, discharging him from all the consequences of the verdict, and restoring him to the enjoyment of all his civil rights and privileges, the same as if the conviction had not taken place.—In the former case, the murderers were men of such notorious bad character that the officers, when they heard of the deed, immediately proceeded to take them up on suspicion. In this case we know that the crime of forgery was not new to Mr. Free-Pardon Patrick Charmers; and we think we can offer some reason for this act of Whig-liberal mercy. Mr. F. P. P. C. was, for some time previous to his incarceration on this charge, an eminent mob-leader, in a small way. He called a public meeting in Smithfield; he headed a deputation to the lord mayor to call a meeting of the livery, to petition for the abolition of the punishment of death for forgery; he often took the chair at the Rotunda; and he is or was, the intimate friend of thot much persecuted and respected publisher of treason, Hethering. These are surely convincing reasons that Mr. Patrick Charmers is a fit subject for the mercy of the sovereign; but if these should fail to convince, we have one still which must be unanswerable—the political union met within these few weeks to petition for this man's pardon, and he is pardoned accordingly.*" That at the time of the defendant's making the said solicitation and request, the defendant represented to the plaintiff and the said *T. Arrowsmith*, since deceased, that the contents of the said statement and paragraph were correct and true; and the plaintiff and the said *T. Arrowsmith*, since deceased, confiding in the truth of the said defendant's said representation, and not knowing that the same was false, or

The declaration stated that the plaintiffs, who were proprietors of a newspaper, at the solicitation and request of the defendant, published a certain statement in their newspaper; that one *Charmers* afterwards commenced an action against them for a libel contained in the publication; and that the defendant in consideration of the premises, and that the plaintiffs would defend the action, undertook to save the plaintiffs harmless, and indemnify them from all payments, damages, costs, charges, and expenses, which they might incur, sustain, or be liable for, by reason of their so as aforesaid publishing the said statement, and of their defending the said action:—*Held*, in an action brought on this indemnity, 1st. that the consideration was entire, and that the part of it which consisted of the publication of a libel being illegal, the whole of it was tainted with illegality; and that the action could not be supported. 2ndly, that if

the former part of the consideration was rejected as surplusage, the promise was then void as amounting to maintenance. *Seemle*, also, that the promise was void as being too large.

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that the said statement and paragraph were in its contents incorrect or untrue, or that the same was libellous, did accordingly, on the said 27th of *January*, 1833, publish the said statement and paragraph in the said newspaper. That afterwards, and before the making of the promise and undertaking of the defendant as heretofore mentioned, one *Peter Charles Charmers*, being the said person named *Charmers* in the said statement and paragraph, to wit, on the 25th of *May*, 1833, commenced an action on the case at his suit, against *Edward Shackell*, then the printer and publisher of the said newspaper, *William Shackell*, the now plaintiff, and the said *Thomas Arrowsmith*, since deceased, in the Court of Common Pleas, for the said publication of the said statement and paragraph, asserting and alleging that the same was a false, scandalous, malicious, and defamatory libel, of and concerning the said *Peter Charles Charmers*; and that he had sustained damages to a large amount thereby; and which said action, at the time of the making of the promise and undertaking of the defendant, as hereinafter mentioned, was depending in the said court, and the defendant had notice of the premises; and thereupon, theretofore, to wit, on the 6th *June*, 1833, in consideration of the premises, and that the said *E. Shackell*, *William Shackell*, and *Thomas Arrowsmith* would defend the said action, he, the defendant, undertook, and then faithfully promised the plaintiff and the said *Thomas Arrowsmith* to save harmless and indemnify them from and reimburse them, all payments, damages, costs, charges, and expenses, which they should or might incur, bear, pay, sustain, or be liable for, for or by reason of their so as aforesaid publishing the said statement and paragraph, and of their defending the said action: and the said plaintiff avers, that he and the said *Thomas Arrowsmith* confiding in the said promise and undertaking of the defendant, did afterwards, to wit, on, &c., accordingly defend the said action, and the same was so defended. And that afterwards, to wit, on the 4th of *July*, 1834, certain issues before then joined in the said action between the parties thereto came on to be, and were, in due form of law, tried at the sittings at *nisi prius* of the said court, after *Trinity Term*, 1834, held at *Guildhall* in and for the city of *London*, before Sir *Nicholas Conyngham Tindal*, knight, his majesty's chief justice of the bench, at *Westminster*, by and before a jury in that behalf chosen and sworn between the said parties; and the said jury then found a verdict in the said action upon the said issues for the said *P. C. Charmers*, and upon their oath said, that he had sustained damages for and by reason of the said publication of the said statement and paragraph, being a false, scandalous, malicious, and defamatory libel of and concerning him, to the amount of 30*l.*; and such proceedings were thereupon afterwards had in the said action, that the plaintiff, *William Shackell*, after the death of the said *Thomas Arrowsmith*, to wit, on, &c., applied to the said Court to set aside the said verdict, and obtained a rule of the said Court, calling upon the said *P. C. Charmers* to shew cause, on a certain day therein named, why the said verdict should not be set aside, and instead thereof a nonsuit be entered; or why the entry of final judgment on the said verdict should not be stayed; that the said *Thomas Arrowsmith* having died before the obtaining of the said rule *nisi*, and before the same was finally disposed of, to wit, on, &c., the said plaintiff, *William Shackell*, being advised by counsel learned in the law, and finding he could not support the said rule, and make it absolute, or set aside the said verdict, or arrest the said judgment, did, after the death of the said *T. Arrowsmith*, and with the leave and consent of the defendant *Rosier*, afterwards, to wit, &c. settle

and compromise the said action with the said *P. C. Charmers*, and thereupon became liable for, and was forced and obliged to and did pay him a large sum, to wit, 60*l.* in satisfaction of the said damages so found by the said jury, and given by their verdict aforesaid, and of the costs and charges of the said *P. C. Charmers*, by him about his suit in that behalf expended; and, by means of the premises, the plaintiff, after the death of the said *T. Arrowsmith*, then became and was damnified and injured to the amount of the said sum of 60*l.*; and also, by means of the premises, the plaintiff and the said *T. Arrowsmith*, during the lifetime of the said *T. Arrowsmith*, and the plaintiff after his death, were put to, incurred, bore, and sustained, and became liable for and paid great costs, charges, and expenses, amounting to 300*l.* in and about the defending and compromising the said action, and in making the said application to the Court, whereof the defendant afterwards, and after the death of the said *T. Arrowsmith*, to wit, on the 2nd of *December*, 1834, had notice; yet the defendant, not regarding his said promise and undertaking, had not yet saved harmless and indemnified the plaintiff and the said *Thomas Arrowsmith*, in his lifetime, or the plaintiff since his death, or reimbursed them or either of them, the said payments, damages, costs, charges, and expenses so made, incurred, borne, paid, sustained, and become liable for as aforesaid, or any of them, or any part thereof, but so to do had hitherto wholly neglected and refused and still did neglect and refuse. Counts for money paid, and on an account stated.

Pleas—First, *non-assumpsit*; secondly, that the defendant did not represent to the plaintiff and the said *T. Arrowsmith*, since deceased, that the contents of the said statement and paragraph in the declaration mentioned were correct and true, *modo et forma*. Conclusion to the country, and issue joined on both pleas.

At the trial of the cause at the *London* sittings after last *Trinity* Term, before *Tindal*, C. J., it was in evidence that the defendant brought a manuscript, containing the libellous statement set out in the declaration, to the plaintiff, and requested that it might be published in the *John Bull* newspaper, stating that he would vouch for the truth of the facts which were detailed; that after the action had been commenced by *Charmers*, the plaintiff gave the defendant (*Rosier*) notice of the proceedings; and informed him that his name would be given up as the author of the libel, unless he gave an indemnity to secure the proprietors, against the liabilities to which they had subjected themselves by the publication; and that the defendant thereupon wrote a memorandum on a card, which he did not sign, and also subsequently promised by parol, that he would indemnify the plaintiff and his partners, against the consequences of *Charmers's* action. A verdict was found for the plaintiff, damages 360*l.*

Tufourd, Serjt., pursuant to leave reserved at the trial, obtained a rule to show cause why the judgment should not be arrested, upon the ground that the pleadings disclosed an illegal contract, which the law would not enforce.

R. Alexander and *Butt* shewed cause.—I. The question is, whether, an indemnity given to the publishers of a statement, which may or may not be a libel, can be enforced in law. It is not necessary to contend that an indemnity

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given to induce the publication of a libel is good. That point came incidentally before the Court of Exchequer in the case of *Colburn v. Patmore* (z), but it was not decided. Here the defendant vouched that the statement was true when he brought it to be published; and the declaration alleges that the plaintiff confided in that representation, and believed it to be true. A distinction may also be taken between an indemnity which is given to protect a party against the consequences of an indictment, and one like the present, which was given to save the plaintiff harmless against the consequences of an action brought to recover damages. Here, *Rosier*, who furnished the false statement, is the party who raises the objection. *Merryweather v. Nixan* (a) decides that there can be no contribution between joint tort-feasors; but Lord *Kenyon* observed that his decision could not affect cases of indemnity, where one man employed another to do acts not unlawful in themselves, for the purpose of asserting a right; and in *Fletcher v. Harcot* (b), *Hobart*, C. J., observes, "He who does a thing which may be lawful, and the illegality thereof appear not to him; he who employs the party, and assumes to bear him harmless, shall be charged." So, here, the publication of the statement might have been lawful, but subsequent inquiries proved that it was not; yet, nevertheless, the defendant ought to save the plaintiff harmless from the consequences of his own misconduct. *Woolley v. Batte* (c), tried before *Park*, J., decides that if damages are recovered against one of two joint coach-proprietors for an injury sustained by the negligence of their servants, the proprietor who was sued may maintain an action for contribution against his co-proprietor. In *Adamson v. Jarvis* (d), an auctioneer sold goods by the defendant's order, and the true owner of the goods afterwards sued the auctioneer, and recovered damages, and it was held, that the defendant was liable to an action at the suit of the auctioneer; and *Best*, C. J., there says, "From the concluding part of Lord *Kenyon*'s judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." *Betts v. Gibbins* (e) lays down the rule to be, that a tort-feasor cannot recover upon a promise to indemnify, which does not extend to a case in which there is any *bond fide* doubt whatever, whether in point of law, the act was authorized. In that case there was a discussion respecting implied and express indemnities, which does not arise here, because an express indemnity was given by the defendant.

II. A good consideration appears on the record to support the promise. The consideration has nothing to do with the overt act of publishing the statement. The action was brought against the present plaintiff before the indemnity was given, and the defending the action was the consideration for the promise. The publication of the libel was then a bygone transaction. If one part of a consideration be good, and the other part void, the Court will enforce the part which is good—*Newman v. Newman* (f); and there a distinction is taken between contracts that are void by the common law and such as are void by statute, which *Ellenborough*, C. J., recognizes; he observes, "But admitting the

(z) 1 C., M., & R., 78.

(a) 8 T. Rep. 186.

(b) Hutton, 55.

(c) 2 Car. & P. 417.

(d) 4 Bing. 66.

(e) 4 Nev. & Man. 64.

(f) 4 M. & S. 66.

condition of this bond to be ill as to one part of it, it seems that it may be well as to the other parts; for you may separate, at the common law, the bad from the good. Supposing, therefore, we hold it to be simoniacal so far as it regards the presentation of the son of the obligee, yet the payment is exempt from all vice." And the part of a consideration which is void need not be proved. *Bradburne v. Bradburne* (g), *Crisp v. Gamel* (h), *Lee v. Mynne* (i), *Vin. Abr., Damages*, Q. pl. 17.

III. If, then, the real consideration for the promise be the undertaking to defend the action, that part of the transaction is not open to the objection of maintenance. *Hawkins* (j) says, "Maintenance is commonly taken in an ill sense, and in general seemeth to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right." *Rosier* having stated to the plaintiff that the paragraph contained a true statement, he was morally bound to save him harmless from the consequences of the action. *Williamson v. Henley* (k) shows how slight an interest is sufficient to avoid an objection on the ground of maintenance; and that the interest need not be of a pecuniary nature. And if a contract is objected to on this ground, the maintenance ought clearly to appear upon the record.

IV. And when a transaction is objected to on the ground that it is tainted with maintenance, it ought to be specially pleaded. *Potts v. Sparrow* (l).

Talfourd, Serjt., and *Petersdorff*, *contrà*. I. It is manifest that this publication was a libel, not only on *Charmers*, who brought the action, but on other persons. The publishers might have been prosecuted by indictment, and then the truth of the publication could have afforded them no excuse. They therefore deliberately published a libel; and it is precisely similar to the case of A. directing B. to beat C.; and then it would be ridiculous for A. to say, I had a good moral ground for causing the punishment to be inflicted. The indemnity was given in consideration of the premises, which includes the previous publication of the libel, and also the consideration that the plaintiff would defend the action brought by *Charmers*.

It is a peculiar quality in the law affecting the publication of libels that it cannot in any case be a lawful act. It is always an indictable offence; and although an assault and similar acts may be lawful, the publishing of a libel cannot in any case be justified. In *Betts v. Gibbins* (m), *Denman*, C. J., observes, "That case of *Merryweather v. Nixan* has certainly been very much overstrained, even beyond the distinction; for Lord *Kenyon* seems to draw a distinction which may fairly include this case. The rule in that case is, that wrong-doers shall not have contribution from one another; and the exception is, that a party may, with respect to innocent acts, give an indemnity to another which shall be effectual, although the act, when it comes to be questioned afterwards, would not be sustainable in a court of law against third persons who complained of it. That seems to be the only effect of that decision, and this case falls, I think, within the exception." The present case resembles *Pitcher v. Bayley* (n) and *Blackett v. Crissop* (o). Although the

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(g) Cro. Eliz. 149.

(h) Cro. Jac. 127.

(i) Cro. Jac. 110.

(j) 1 Pleas of the Crown, 454.

(k) 6 Bing. 304.

(l) 1 Bing. N. C. 594; 1 Hodges, 135.

(m) 4 Nev. & M. 76.

(n) 8 East, 176.

(o) 1 Lord Ray. 278.

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point now in discussion was not decided in *Colburn v. Patmore*(p), Lord *Lyndhurst* gives a very strong opinion upon it; he says, "I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point; but I may say, that I entertain little doubt that a person who is declared by the law to be guilty of a crime, cannot be allowed to recover damages against another, who has participated in its commission."

II. It is said that, as this is a divisible contract, the illegal part of the consideration may be excluded; and that the defending the action will then stand as the consideration for the defendant's promise to indemnify. But upon reading the declaration it will appear that the contract is not divisible; and if it were, the objection of maintenance would immediately arise. The defendant would then appear as a mere volunteer, who came forward to defend the publication of a libel. In *Wallis v. Duke of Portland*(q), Lord *Loughborough* says, upon the subject of maintenance, "The case disclosed is of this nature; an undertaking supposed between the plaintiff and the defendant, that the latter would contribute to the expense of a petition against the return of a member of Parliament, in the whole or a given extent. That is an engagement between two parties to the injury and oppression of a third; in short, it is maintenance; for maintenance is not confined to supporting suits at common law. In the first book you open upon the subject, (one naturally looks into *Hawkins*,) it is stated to be either *in pais* or by prosecuting suits. Maintenance *in pais* is punishable by indictment. Maintenance by prosecuting suits, without distinguishing what suits, is punishable by an action by the party grieved also; and that is an action at common law. Statutes prohibiting particular species of maintenance add penalties; but it is laid down as a fundamental authority that maintenance is not *malum prohibitum*, but *malum in se*; that parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expense." *Master v. Miller*(r).

III. There is no mutuality of contract between these parties, and a similar objection was successfully maintained in *Lees v. Whitcomb*(s).

TINDAL, C. J.—It becomes unnecessary to take notice of any part of this rule except that which relates to the arresting of the judgment (t); and I am of opinion that the judgment ought to be arrested upon two separate grounds, either of which would be sufficient; first, because of the illegality of the consideration; and secondly, from the extent of the promise.

The declaration alleges that the plaintiff and his late partner were proprietors of the *John Bull* newspaper, and that they, at the solicitation and request of the defendant, had published a certain paragraph in their newspaper; and it is impossible to doubt that this paragraph contained a libel upon the party who is mentioned in it; the declaration then goes on to allege that one *Peter Charles Charmers* brought an action against the proprietors of the newspaper to recover damages for the publication of the libel; and that thereupon, in consideration of the premises and that the plaintiffs would defend the action, he,

(p) 1 Cr., M., & R., 73.

(q) 3 Vesey, jun., 494.

(r) 4 T. Rep. 340.

(s) 3 Car. & P. 289.

(t) An objection had been taken to the admissibility of the written indemnity.

the defendant, undertook and then faithfully promised the plaintiffs to save harmless and indemnify them from, and re-imburse them all payments, damages, costs, charges, and expenses, which they might incur, bear, pay, sustain, or be liable for, for or by reason of their so as aforesaid publishing the said paragraph and defending the said action. The consideration which it stated, therefore, consists of two parts; first, "in consideration of the premises," which is, that the plaintiff, at the defendant's solicitation and request, had published the paragraph in question. Now this part of the consideration may be rejected as surplusage, or it may not.

It is contended for the plaintiff that it may be rejected altogether, and that the consideration may be restrained to that part which is legal, namely, the defending of the action which had been commenced. But if this former part is rejected, then this is a promise made by a perfect stranger, who steps forward, and, in the very sense and meaning of maintenance, undertakes to defend an action which, without his interference, would not perhaps have been resisted.

If, on the other hand, that part of the declaration is not rejected, and framed as it is I cannot see how it can be, then the other objection arises, and a part of the consideration is, that the plaintiff, at the solicitation of the defendant, had published a libel; in other words, had committed a misdemeanor. What is this but an agreement to commit a breach of the law? and this cannot be made a part of the consideration to support a promise. But it is said that the illegal part of the consideration may be rejected. There are no doubt cases where the consideration consists of two parts, and if one part is impossible, or not intelligible, the promise may then be supported by that part which is plain and intelligible; but all the cases draw a distinction between a void consideration and one which is illegal. Thus, in *Featherston v. Hutchinson* (t), the declaration alleged that the plaintiff, a bailiff, had taken a debtor in execution, and that the defendant, in consideration that the plaintiff would permit the debtor to go at large, and of two shillings paid to the defendant, promised to pay the plaintiff all the money in which the debtor was condemned; and it was held, that the consideration was not good, being contrary to the stat. 23 Hen. 6; and though it was joined with another consideration, of two shillings, yet, being void, and against the statute, in part, it was void in all (u).

It has been contended, that there is a distinction between a consideration void by statute, and one void at common law; but, in this case, I cannot act upon so nice a distinction as that; but I am of opinion that as part of the consideration is illegal, the whole is therefore bad.

But if this were not so, I should say that the promise is far too extensive to be supported. It is to indemnify and pay all damages, costs, charges, and expenses, which the plaintiffs might incur, bear, or be liable for, by reason of publishing the libel. This amounts to a general indemnity against all the the consequences of the act, whether they consist of the costs and damages of an action; of a fine, passed by way of punishment; or of the damages sustained by the plaintiff by reason of his being imprisoned. It seems to me that it scarcely needs an argument, to show that such an indemnity cannot be supported on public grounds; for such a decision would cause

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(t) Cro. Eliz: 199.

(u) See also *Waite v. Jones*, 1 Hodges, 166, and *King v. Sears*, 1 Gale, 168.

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a vast increase in the commission of an offence, which it is the object of the law to prevent. This rule for arresting the judgment must therefore be made absolute.

PARK, J.—It is impossible to look at this declaration without seeing that the publication of the libellous paragraph was a part of the consideration for the defendant's promise; and the distinction which has been drawn between considerations void by statute and common law, is not applicable. I have looked at *Newman v. Newman* (v), which has been cited upon this point, and it does not apply to this case. What does this declaration state? That, in consideration of the premises—these premises being, amongst other things, the publication of the libel—the defendant undertook to save the plaintiff harmless from all costs and expenses which he might be put to by reason of the publication. The whole of the consideration must therefore be treated as one entire matter; and if that were not so, and the illegal part was taken away, then the promise of the defendant was the act of a perfect stranger interfering to defend an action which had been brought against a third party. This point was considered in the case of *Farebrother v. Ansley* (w), and two authorities are there cited in a note: the first is *Fletcher v. Harcourt* (x), which is not particularly applicable, but *Martin v. Blithman* (y), bears a very strong analogy to the present case. I agree with my lord, that it would lead to much inconvenience, if such an indemnity as this were supported. *Merryweather v. Nisan* (z), has been commented upon, as if the doctrine there laid down had been overruled, but that is not so. That cause was tried before Mr. Baron Thompson, one of the most eminent judges of his time: he held that no contribution could be claimed as between joint wrong-doers; and Lord Kenyon refused to grant a rule for a new trial, saying that there could be no doubt that the nonsuit was proper. It has been contended, that *Woolley v. Batte* (a), which was tried before me, is at variance with *Merryweather v. Nisan*, but the cases are perfectly distinct; and I should have doubted much, before I overruled a decision by the eminent judge whose name I have mentioned. I will only add, that although *Colburn v. Patmore* (b), does not afford an express decision; yet Lord Lyndhurst expresses a very strong opinion that such an action as this could not be maintained. For these reasons, I agree that judgment ought to be arrested.

VAUGHAN, J.—After the luminous judgments which have been delivered, I content myself with saying that I concur in them. I will only add one or two observations. The principle we have been considering, was discussed in *Colburn v. Patmore*, and although it was unnecessary to decide this question, yet Lord Lyndhurst and the other judges, seem to entertain no doubt that a party, who had published a libel, could not enforce an indemnity of this nature. The argument has proceeded upon the ground that the consideration may be separated, and the illegal part be rejected; but it seems to me that the whole is so interwoven and incorporated together, that it is impossible to separate one part of it from the other. As to the cases which have been cited, *Newman v. Newman* (v) was of a different description; and *Crisp v. Gamel* (c)

(v) 4 M. & S. 66.
 (w) 1 Camp. 342.
 (x) Hutton, 55.
 (y) Yelv. 197.

(z) 8 T. Rep. 186.
 (a) 2 Car. & Pay. 517.
 (b) 1 Cr., Mee., & R., 83.
 (c) Cro. Jac. 127.

merely shows that an idle or frivolous consideration may be rejected. Here part of the consideration is illegal, and, under the circumstances of the case, it would not be conducive to the peace of society, if we were to enforce the indemnity. This rule must therefore be made absolute, on the ground that the consideration for the promise is in part illegal; and if that objection were removed, then the contract would still be illegal, on the ground of maintenance.

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BOSANQUET, J.—The contract set out upon this record, appears to me to be illegal. The promise is to bear the plaintiff harmless, and to indemnify him from all damages and expenses which he might sustain by publishing the paragraph, and by defending the action; and it appears upon the face of the declaration, that the publication took place at the solicitation and request of the defendant.

The paragraph was manifestly illegal, and the subject of an indictment, as well as of an action on the case at the suit of the party injured. This case does not therefore interfere with the principle laid down in *Merryweather v. Nizam* (e). Whether this statement were true or false, the plaintiff and the defendant had both concurred in publishing a statement which it is the policy of the law not to permit. The injury done to the individual might, indeed, be justified; but it appears to me that there is a material distinction between this case and *Betts v. Gibbons* (f); because there the act done might, *prima facie*, be lawful, but here the publication was necessarily illegal.

I am also of opinion, that the words “in consideration of the premises,” refer to all the previous matter stated in the declaration, and that shows that the plaintiff and the defendant were jointly concerned in the commission of an illegal act, which forming a part of the consideration, the whole of it is tainted with illegality. It has already been observed, that if the illegal portion of the consideration were rejected, then the defendant appears as an entire stranger, who has voluntarily and officiously defended a suit—thereby being guilty of the offence of maintenance, within the very words of the definition given by *Hawkins* in his Pleas of the Crown.

Rule absolute.

(e) 8 T. Rep. 186.

(f) 2 Ad. & Ellis, 57.

LAYTHORPE v. BRYANT.

April 30th.

ASSUMPSIT against the defendant for refusing to complete the purchase of certain premises belonging to the plaintiff, which were sold by auction (a). At the trial, before Tindal, C. J., at Guildhall, it was in evidence that the defendant purchased the premises as the best bidder at a sale by auction; the bill of particulars, and conditions of sale, announced that “the lease and goodwill of a messuage, in Stoke Newington, in which the coke, coal, and seed

1. The Stat. of Frauds (29 Car. 2, c. 3, sec. 4.) does not require that an agreement, upon a contract for the sale of land, should be signed by both parties; it is sufficient if it is signed by the

(a) See the pleadings in this cause *Laythorpe v. Bryant*, 1 Hodges, 19.

party to be charged as defendant in the action.

2. Where, by the particulars and conditions of sale, it appeared that A. was the auctioneer, and B. the owner of certain premises, and C. signed an agreement on the back of the conditions to purchase the premises; it was held, that the names of the contracting parties sufficiently appeared.

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trades had been carried on, would be peremptorily sold by auction, by Mr. Ross, at the Auction Mart, on the 3rd of December, by order of Mr. Laythorpe, the proprietor retiring from trade." After the sale, the defendant signed a memorandum on the back of the conditions, by which he acknowledged that he was the purchaser of the premises, at the price of 440*l.*; no person signed on behalf of the vendor, and the defendant, who was known to the auctioneer, was not required to pay any deposit.

A few days after the sale, the plaintiff's solicitor sent an abstract to the defendant, who returned it with an intimation that he had not purchased the premises. An assignment of the lease was afterwards sent to the defendant, which he also returned. The plaintiff then resold the premises at a less price than the defendant had agreed to give, and brought the present action to recover the difference of the two sales, and the expenses which were incurred.

It was objected, for the defendant, that there was a want of mutuality in the contract which was signed; and that the provisions of sec. 4 of the Statute of Frauds required that it should be signed by the vendor or his agent (*b*). The learned judge overruled the objection, reserving leave to move for a nonsuit. The jury found a verdict for the plaintiff, with 28*l.* damages.

Atcherley, Serjt., obtained a rule *nisi* to enter a nonsuit on the above grounds.

Bompas, Serjt., and *Steer*, shewed cause. By the 4th sec. of the Statute of Frauds, (29 Car. 2, c. 3,) it is required that the contract should be signed by "the party" to be charged; and by the 17th sec. the words are that the bargain shall be signed "by the parties to be charged by such contract." Therefore the same construction is applicable to both these sections; and there are abundance of authorities to show that, under the 17th sec., the signature of one party is sufficient. *Egerton v. Matthews* (*c*), *Allen v. Bennet* (*d*), *Wain v. Warlters* (*e*), *Schneider v. Norris* (*f*). And in *Emmerson v. Heelis* (*g*), which was a case under the 4th sec., it was held that a signature by an auctioneer, as the agent of the buyer, was sufficient to bring the case within the statute. Lord Mansfield, C. J., there says, "If the auctioneer is an agent for the purchaser, then the Statute of Frauds is satisfied, because the memorandum in writing is signed by an agent for the party to be charged." *Champion v. Plummer* (*h*) may appear at first sight to be the other way; but, upon examination, it will be found that the objection there was, that the names of the contracting parties did not appear; and as Sir James Mansfield, C. J., observes,

(*h*) Stat. 29 Car. 2, c. 3, s. 4, enacts, "That no action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage, of another person, or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be per-

formed within the space of one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

(*c*) 6 East, 308.

(*d*) 3 Taunt. 169.

(*e*) 5 East, 16.

(*f*) 2 M. & S. 286.

(*g*) 2 Taunt. 38.

(*h*) 1 New Rep. 232.

"it would prove a sale to any other person as well as to the plaintiff: there cannot be a contract without two parties." The cases in equity also show that the signature of both parties is not required. In *Buckhouse v. Crosby* (i), the Lord Chancellor said, on considering the 4th section, "Here plainly appears a contract on the part of *Moon*: he had often known the objection taken, that a mutual contract in writing ought to appear on both sides; but that opinion has as often been overruled." *Seton v. Slade* (j), *Hatton v. Gray* (k), *Fowle v. Freeman* (l), and *Tuwney v. Crowther* (m), are to the same effect. In *Western v. Russell* (n), Sir Wm. Grant observes, "After the cases that have been determined, I should hardly be at liberty, notwithstanding the considerable doubt thrown upon that point by Lord Redesdale (o), to refuse a specific performance upon the ground that there was no agreement signed by the party seeking a performance;" and in a former case, *Lord Ormond v. Anderson* (p), Lord Mansfield also refused to acquiesce in the doubts entertained by Lord Redesdale.

As to the objection, that there is a want of mutuality in this contract; in *Payne v. Cave* (q), it is said, "the auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding: that is signified on the part of the seller by knocking down the hammer." In a court of equity, a written undertaking signed by one party will be enforced, although the other party is not mutually bound by writing.—*Palmer v. Scott* (r). *Wain v. Warlters* (s) merely decides that a consideration must appear in the agreement. Here the name of the plaintiff appeared upon the conditions of sale. If it were necessary to contend that the assent of the vendor was required, then the letters, written by his attorney to the defendant, are a sufficient answer to that objection (t).

Aitcherley, Serjt., and Busby, contrd.—This is a contract relating to a sale of lands, within the 4th section of the Statute of Frauds; and in that section the word "agreement" is used. It is not a question to inquire what a court of equity would do upon an application for a specific performance; upon that point the decisions are at variance, as to when an admission by the defendant will dispense with the Statute of Frauds. *Whitchurch v. Bevis* (u), *Roberts on Frauds*, 106, 156; *Charlewood v. Duke of Bedford* (v). Nor is this case to be considered as if it arose under the 17th sec. of the statute, where the word "contract" is used, and not "agreement." *Egerton v. Matthews* (w).

All the authorities in equity were carefully reviewed by Lord Redesdale, in *Lawrenson v. Butler* (x); and he refused to decree a specific performance, because the right to compel it was not mutual. He said, "I confess I have no conception that a court of equity ought to decree a specific performance in a case where nothing has been done in pursuance of the agreement, except where both parties had, by the agreement, a right to compel a specific performance, according to the advantage which it might be supposed they were to derive

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(i) Eq. Cases, Abr. pl. 44.
(j) 7 Vesey, 275.
(k) 2 Chan. Cases, 164.
(l) 9 Vesey, 351.
(m) 3 Bro. C. C. 319.
(n) 3 Vesey & Beames, 187.
(o) *Lawrenson v. Butler*, 1 Sch. & Lefroy, 13.
(p) 2 Ball & Beatty, 370.

(q) 3 T. Rep. 148.
(r) 1 R. & Mylne, 391.
(s) 5 East, 10.
(t) See, upon this point, *Dobell v. Hutchinson*, 1 Har. & Woll. 394.
(u) 2 Bro. C. C. 567.
(v) 1 Atk. 497.
(w) 6 East, 308.
(x) 1 Sch. & Lefroy, 13.

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from it; because, otherwise, it would follow that the Court would decree a specific performance where the party called upon to perform it might be in this situation: that if the agreement was disadvantageous to him, he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance. This is not equity, as it seems to me." And, again, his lordship says, in the same judgment: "It is said that courts of equity have decreed performance in cases where one party only was bound by the agreement: I believe it would be difficult to find a case where that has been done, particularly a late case. In the case of *Hatton v. Gray* (y), it was considered as sufficient that the agreement should be signed by the party against whom the performance was sought, because such are the words of the Statute of Frauds: now such certainly is the import, that no agreement shall be in force but when it is signed by the party to be charged; but the statute does not say that every agreement so signed shall be enforced: the statute is in the negative. To give it this construction would, as I have heard it urged, make the statute really a statute of frauds, for it would enable any person, who had procured another to sign an agreement, to make it depend on his own will and pleasure, whether it should be an agreement or not." This case was noticed by Lord *Manners*, in *O'Rourke v. Percival* (z); and in *Martin v. Mitchell* (a), Sir *Thomas Plumer* agreed with Lord *Redesdale* that a contract ought to be mutual.

But the 4th section of the statute requires an "agreement" to be signed. In an agreement there must be a mutuality between the parties. Here the defendant could not have compelled the plaintiff to have carried the sale into effect, because there is nothing on the face of this instrument to bind him. *Wheeler v. Collier* (b). [*Tindal*, C. J.—In *Wheeler v. Collier*, the name of the vendor did not appear.] The fact that the abstract was sent, would not be sufficient. *Gosbell v. Archer* (c). *Wain v. Warlters* (d) decides that there must be a mutuality to make an agreement. The following extract, from the report of that case is in point: "Lord *Ellenborough*, C. J., after noticing the definition of the word agreement, by Lord Chief Baron *Comyns*, who considered it as a thing to which there must be the assent of two or more minds, and which, he says, ought to be so certain and complete, that each party may have an action upon it; for which, in addition to the author's own authority, was cited that of *Plowden*; and better (his lordship observed,) could not be cited." *Lees v. Whitcomb* (e) is another authority to shew that there must be a mutuality to make an agreement.

TINDAL, C. J.—This case is brought before us upon two objections. The first is, that the contract does not contain the names of the contracting parties; and I admit, that, to make a perfect agreement, you must be able to ascertain the names of the parties, as well as the consideration upon which it is founded. This agreement is written upon the particulars and conditions of sale; and it appears by them that *Ross*, the auctioneer, is authorised to sell the premises for the plaintiff; and as we are necessarily referred to these documents, it can clearly be seen that *Ross* was merely the auctioneer, and that *Laythorpe* was the owner of the property. This, therefore, disposes of the first objection. The

(y) 2 Ch. Cases, 164.
 (z) 2 Ball & Beatty, 62.
 (a) 2 Jac. & Wal. 413.
 (b) 1 Mo. & Mal. N. P. C. 125.

(c) 4 Nev. & Man. 491, note (a) 1 Har. & Woll. 31. S. C.
 (d) 5 East, 16.
 (e) 5 Bing. 34.

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other objection is of a wider nature. It is, that this contract has not been signed by both the parties thereto. To see if this is a valid objection, we must refer to the terms of the 4th section of the Statute of Frauds, 29 Car. 2, c. 3. —[His lordship read the section (f).] I think that the object of this section was, that no action should be brought upon any contract or sale of lands, unless the agreement was signed by the defendant in the action, or by his agent. The frame-work of the section obviously admits of this construction, for the word "defendant" is introduced in the second branch of the section. It seems, then, that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt of another, or to charge any person upon any agreement made in consideration of marriage, or upon any contract or sale of lands, &c., unless the agreement shall be signed—by whom? by the party to be charged therewith; in other words, by the defendant in the action. But it is objected, that, by this construction, there is a want of mutuality in the contract, because the defendant is without any remedy to enforce the contract, as against the plaintiff. But whose fault is that? The defendant might have insisted that the plaintiff or his agent should sign the contract. But it seems to be the object of the statute to secure the defendant's signature, for the preamble declares that the statute was passed "for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury;" and the beneficial object of the statute is wholly answered by this construction. It is said, that the introduction of the word "agreement," makes it necessary that both parties should sign, to render it valid. Some confusion has existed, during the argument, in distinguishing between the consideration for an agreement, and its mutuality. The true consideration for the agreement must appear upon the face of it: that was decided in *Wain v. Warlters* (g), upon the ground that the word *agreement* imported a consideration as well as a contract: whatever the *consideration* may be, it must appear upon the agreement. But I can find no case, and I know of no reason, why we should hold that the *signature* of both parties is necessary. The agreement is, in fact, complete before either party signs it, and the signature comes afterwards.

Let us apply this to some of the cases provided for by the 4th section, for all must receive the same construction. Take, first, a letter, written by an executor, undertaking to answer for damages out of his own estate. Here there would be no necessity for a letter on the other side, unless, indeed, it was to accept an offer which was contained in the first communication. Look at the next case, of answering for the debt of another person. It is every day's practice, to undertake to pay the debt of another; but I never heard it objected, that some writing must be produced which was signed by the creditor. Indeed, why was not this very objection taken in *Wain v. Warlters* (g)? for it would have afforded a much easier answer to the action, than that upon which the case was determined. It seems to me, therefore, that the word *agreement* is satisfied, if it states the subject-matter of the contract, shews a good consideration upon its face, and is signed by the party who is sought to be charged.

Several cases have been cited. There are only two which I shall refer to. The first is *Emmerson v. Heelis* (i), which was the case of an agreement

(f) See this section, *ante*, p. 26, *note* (b).

(i) 2 Taunt. 38.

(g) 5 East, 10.

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under the 4th section of the statute; and it was enforced, although it was only signed by the agent for the party to be charged. I do not lay too much stress on the case of *Allen v. Bennet* (j), which fell under the 17th section, which requires that the contract should be signed "by the parties to be charged therewith;" but there it was again held, that both parties need not sign. *Lees v. Whitcomb* (k), which has been cited, does not bear on the point before the Court. As to the decisions in the courts of equity, it seems to me that the current of the authorities is not in accordance with the dicta of Lord Redesdale, in *Lawrenson v. Butler* (l), and Sir T. Plumer, in *Martin v. Mitchell* (m). The rule must be discharged.

PARK, J.—The cases in equity need not be taken into consideration; and if they were, the preponderance of authority is very much in favour of the plaintiff; for, although the opinions of Lord Redesdale and Sir Thomas Plumer have been much relied upon, I find that Lord Mannors, in subsequent cases, did not support those opinions. The cases on the 17th section of the statute might also be put out of the question; because the words used in that section are somewhat different from those in the 4th section. But it is to be remarked, that, although the word "parties" is used in the 17th section, it has not been considered necessary that both parties should sign the contract. Upon this point, it is only necessary to refer to *Saunderson v. Jackson* (n), and *Schneider v. Norris* (o). As to the construction of the 4th section, I have always thought it better to adhere to the express words of a statute, than to make fanciful distinctions. Now this agreement is signed by the party to be charged therewith; the consideration upon which it is made, fully appears; and the plaintiff's name, as well as the name of the auctioneer, appear upon the conditions of sale. All the terms required by this section, therefore, seem to me to be fully complied with. *Lees v. Whitcomb* (k), which was tried before me, does not bear upon this question. I agree that this rule must be discharged.

VAUGHAN, J.—All the essential requisites of this section have been complied with, according to the letter and spirit of the statute; and during my experience in construing acts of parliament, I have observed the necessity of abiding by the strict words of the statute itself. The argument for the defendant has arisen out of a misconception of *Wain v. Warlters* (q). That case was much doubted when it was decided; but it has always been subsequently recognised. It is, however, a mistake, to suppose that the question there, turned on the mutuality of the contract: it only decided that an agreement must contain a consideration as well as a promise; because all the evils to be remedied by the Statute of Frauds would otherwise have been again brought into existence. Mr. Justice Le Blanc observes, in that case, "I think we must adhere to the

(j) 3 Taunt. 169.

(k) 5 Bing. 34.

(l) 1 Scholes & Lefroy, 13. There is a note attached to this case by the reporters, from which it appears that Lord Redesdale had intended to give the point further consideration. The note is as follows: "His lordship intimated a wish to look into the cases that were this day cited, and directed the cause to stand over till to-morrow; but,

in the course of the day, counsel for the plaintiff informed his lordship that the plaintiff was content that his bill should be dismissed without costs, he undertaking not to bring an action at law; and accordingly the bill was dismissed."

(m) 2 Jac. & Wal. 413.

(n) 2 B. & P. 238.

(o) 2 Taunt. 38.

(q) 5 East, 10.

strict interpretation of the word *agreement*, which means the consideration for which, as well as the promise by which, the party binds himself." It appears that this is not the first time this objection has been taken; many equity cases have been referred to, where it has been discussed; and it is to be observed, that the great luminaries of the law—Lords *Hardwicke*, *Thurlow*, and *Eldon*, and Sir *Wm. Grant*, have, one and all, decided that the signatures of both parties are not necessary. *Seton v. Slade*, (r), and *Fowle v. Freeman* (s), are directly in point.

The cases, therefore, present one uniform stream of authority, with the exception of the doubts which were entertained by Lord *Redesdale* and Sir *Thomas Plumer*. The real question is, whether this contract is not signed by the party "to be charged therewith."

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BOBANQUET, J.—This case is founded upon the construction of the 4th section of the statute, and its meaning must be collected from the terms used in that section, when taken by themselves, and also by contrasting them with the words used in the 17th section. It has been contended, that there is a difference of opinion to be found in the courts of equity; but if it were necessary to enter into a consideration of those cases, it appears to me that the weight of opinion is very much in favour of the construction which we now adopt. But, in the courts of law, I do not find any such difference of opinion; and if there were, we must, after all, resort to the statute. The language of the 4th section is, that "no action shall be brought," in certain cases, unless the agreement "shall be in writing, signed by the party to be charged therewith:" this does not avoid the contract, but provides that, unless certain proofs of it are preserved, no action shall be maintained. But the words of the 17th section are stronger: there it is enacted, "that no contract shall be allowed to be good," except some memorandum of the bargain "be signed by the parties to be charged by such contract." Now it is to be remarked, that there are numerous decisions, under the 17th section, to shew that the signature of one of the parties is sufficient; and the circumstance that the word "parties" is used in that section, and the word "party" only, in the other, seems to be worthy of notice. But it is said, that, by the 4th section, an agreement is required, and that the *agreement* must be signed. In the first place, is this an agreement, and is it signed? It purports to be a memorandum of agreement; it states the name of the purchaser, who has signed it, and the price which is to be paid for the premises; it is written on the particulars of sale, and they contain the name of the vendor, and a description of the property to be sold: therefore this document, when taken altogether, incorporates every thing which is necessary to constitute an agreement, within the language of the statute. The next point is, whether the plaintiff can enforce this agreement, in consequence of not having signed it himself. The statute requires that it shall be signed by the party "to be charged therewith:" the defendant is that party. I cannot think that the statute intended to throw upon the vendor the burthen of proving the existence of some other memorandum, signed by himself, which is in the possession of the defendant; for it is a common practice for each party to deliver to the other a memorandum signed by himself. It would also impose a great burthen upon the plaintiff, where an agreement

(r) 7 Vesey, 275.

(s) 9 Vesey, 351.

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arises out of a correspondence; for very few persons, in ordinary life, would be prepared to give evidence of the contents of their own letters. I am, therefore, of opinion that this rule must be discharged.

Rule discharged (t).

(t) See *Knight v. Crockford*, 1 Esp. N. P. C. 190; *Hodson v. Le Bret*, 1 Camp. N. P. C. 233; *Phillimore v. Burry*, 1 Id. 513; *Croper v. Smith*, 15 East, 103; and *Balemos v. Phillips*, Id, 272.

April 27th. PAGET and anr. v FOLEY, Executrix of ANN CHAMBERS, decd.

In covenant for rent reserved, on an indenture of demise, the limitation of the right to sue, is provided for by 3 & 4 W. 4, c. 42, sec. 3, which *pro tanto* repeals the 3 & 4 W. 4, c. 27, sec. 42.

Seemle. (Bonquet J. dissentiente,) that the 3 & 4 W. 4, c. 27, sec. 42, does not apply to rents reserved on specialty.

COVENANT by the assignee of the reversion against the executrix of the lessee. The declaration stated, that one *A. H. Chambers*, being possessed of the tenements hereinafter mentioned to have been demised to *Ann Chambers* for the residue of a term of years, whereof twenty would remain unexpired after the expiration of the lease thereafter mentioned, on the 2nd of April, 1808, by indenture, demised the same to *Ann Chambers*, to have and to hold for the term of sixty years, from the 25th of March, then last past; yielding and paying therefore 10l. 10s. per annum, during the life of the said *Ann Chambers*, and 15l. 15s. per annum, after her decease; and that the said indenture contained a covenant that the said *Ann Chambers*, for herself, her heirs, executors, administrators, and assigns, would pay the said rent; that the said *A. H. Chambers*, on the 21st of October, 1824, by indenture, bargained, sold, assigned, transferred, and set over, the premises so demised as aforesaid, to the plaintiffs, to have and to hold the same, and his reversion therein, to the plaintiffs, their executors, administrators, and assigns, for the residue of the term of which *A. H. Chambers* was so possessed as aforesaid.

The declaration then set forth two breaches of covenant. First: That after the making of the assignment to the plaintiffs, and in the lifetime of *Ann Chambers*, and during the term granted to her as aforesaid, to wit, on the 29th of September, 1825, 10l. 10s. of the rent aforesaid, for one year of the said term then elapsed, became and was due and owing, and still was in arrear and unpaid to the plaintiffs, contrary to the tenor and effect of the said indenture, and of the said covenant of *Ann Chambers*. Secondly: That after the making of the said assignment, and after the death of the said *Ann Chambers*, and during the term granted to her as aforesaid, to wit, on the 25th of March, 1835, 149l. 2s. 5d. of the rent aforesaid, for nine years and one-half a year of the said term elapsed since the death of *Ann Chambers*, became and was due and owing, and still was in arrear and unpaid to the plaintiffs, contrary to the tenor and effect of the said indenture, and of the covenant of the said *Ann Chambers*.

The defendant craved oyer of the deed of assignment, by which it appeared that the plaintiffs took the premises as mortgagees. The pleas were, as to the breach of covenant first assigned, that the said sum of 10l. 10s., of rent aforesaid therein mentioned, did not, nor did any part thereof, become due at any time within six years next before the commencement of the suit, nor had any acknowledgment of the same, in writing, signed by the defendant or her agent, been given to the plaintiffs or their agent, at any time within six years next before the commencement of the suit.

The following points were marked for argument :—"The plaintiffs will contend that the period of six years is not any limitation in bar to an action upon a covenant."

"The defendant will contend that by stat. 3 & 4 W. 4, c. 27, s. 42(a), the plaintiffs are precluded from recovering any arrears of rent, but within six years next after the same became due; that the assignment of the term granted by *A. H. Chambers*, was made to the plaintiffs, by way of mortgage, and not otherwise; that the stat. 3 & 4 W. 4, c. 42, s. 3(b), has not the effect of repealing the stat. 3 & 4 W. 4, c. 27, s. 42, or any part thereof."

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R. V. Richards, in support of the demurrer. The question is, whether in an action of covenant to recover rent, the period of limitation is six or ten years. This plea, that six years is a bar to the action, cannot be supported.

I. The case of rent secured by a covenant, is not included within the 3 & 4 W. 4, c. 27, s. 42. It cannot be supposed that it was the object of this statute to bar an action to recover rent secured by deed, after six years, whilst the old period of limitation was left in all other actions of covenant. The chief intention of the section was to protect tenants from the remedy by distress after six years, and also to bar actions for use and occupation.

It will be said, that the stat. of 21 Jac. 1, c. 16, applied to actions of debt for arrearages of rent; that may be so, for the object might have been to re-enact that provision. It is a strong argument for the plaintiffs, that the words of s. 42 of 3 & 4 W. 4, c. 27, are nearly similar to those used in the stat. of *James*; and in *Freeman and Stacy's*(c) case, it was held that that statute did not apply to cases of rent reserved by indenture. But the limitation of the power to distrain for rent was the object principally sought to be attained by s. 42 of 3 & 4 W. 4, c. 27.

II. If it be held that 3 & 4 W. 4, c. 27, extends to rent reserved by deed, then that enactment is repealed by the subsequent stat. of 3 & 4 W. 4, c. 42, s. 3. That section clearly embraces the case now before the Court, which is an action of covenant upon a speciality. The last-mentioned statute received the

(a) Stat. 3 & 4 W. 4, c. 27, s. 42, enacts, "That after the 31st of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

(b) Stat. 3 & 4 W. 4, c. 42, s. 3, enacts, "That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond, or other speciality, and all actions of debt, or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by speciality, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *scire facias*, and all actions for penalties, damages,

or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other speciality, actions of debt, or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

(c) Hutton, 109.

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royal assent on the 14th *August*, 1833, and the 3 & 4 W. 4, c. 27, on the 24th *July*, in the same year; and in *Rex v. Justices of Middlesex* (d), it was held, that when two Acts of Parliament, which passed during the same session, are repugnant to each other, that which last received the royal assent must prevail, and be considered as a repeal of the other. In *Paddon v. Bartlett* (e), it was contended that the stat. 3 & 4 W. 4, c. 42, s. 3, repealed the former enactment, but it became unnecessary to decide the point, although Lord *Abinger*, C. B. seems to have approved of the argument.

Stephen, Serjt. *contrà*.—

I. If the 3 & 4 W. 4, c. 27, s. 42, does not apply to rent secured by indenture, to what does it apply? The stat. 21 *James*, c. 16, previously afforded the limitation to the recovery of rent in arrear, except where it was reserved by deed; and the words of the 42nd section, are, "any distress, *action*, or *suit*;" and therefore it cannot be said that the object of the statute was to limit the remedy by distress only. The legislature must, therefore, have contemplated actions to recover rent secured by deed, or the words of the statute would not operate at all. In *Freeman and Stacy's case* (f), the decision left something behind, upon which the statute would operate; namely, upon actions to recover arrearages of rent, which were not secured by specialty. The 41st sect. of 3 & 4 W. 4, c. 27, applies to arrears of dower; and it is a consistent construction of the following section, to say that it applies to all other kinds of arrears except dower.

II. These two statutes were both passed in the same session of Parliament, and they ought to receive a contemporaneous exposition, especially as there is no necessary collision between them. The first appears to have been framed by conveyancers, with a view to relieve land from incumbrances; the second, having personal rights for its object, must be viewed by the eye of the common law. The 3 & 4 W. 4, c. 27, having reference to the state of real property, proceeds in several sections to set land free from incumbrances; and the Court will not, upon slender grounds, defeat the intention of the statute, especially if both acts can be construed together. Now, first, if the action is commenced within six years, it will certainly be commenced within the longer limitation provided in the subsequent statute. Secondly. This is an action of covenant to recover rent, and the words of the 3rd section are "all actions of *debt* for rent upon an indenture of demise;" this is not an action of debt, and therefore it is not included; and the subsequent addition of "actions of covenant upon any bond or other specialty" do not necessarily include an action of covenant, brought on an indenture of demise. Nor does the latter statute provide for remedies by distress, which it would have done, if it had been intended that it should operate as a repeal of the former enactment. By sect. 40, of 3 & 4 W. 4, c. 27, mortgage-money shall be deemed to be satisfied at the expiration of twenty years; and sect. 42. goes on to enact, that arrears of interest in respect of a sum of money charged upon land, shall not be recovered after six years, thereby plainly shewing that it was the object of the legislature speedily to relieve land from the charge of principal money and interest claimed on a mort-

(d) 2 B. & Adol. 818.

(f) Hutton, 109.

(e) 5 Nev. & Man. 383; 1 Har. & Woll. 477.

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gauge. *Rex v. Justices of Middlesex* (g) turned on the construction of two turnpike acts, which could not be reconciled; the question here is, whether there be an insuperable repugnancy between the two statutes. *Paddon v. Bartlett* (h) did not decide any thing upon this question.

III. It will be useful to refer to the general principles which have guided the courts in the exposition of repugnant statutes. In *Com. Dig. Parliament*, R. 9, it is said, "A later statute, general and affirmative, does not abrogate a former, which is particular; as the stat. 5 *Eliz.* 4, that none use a trade without being apprentice, does not take away 4 & 5 *Philip and Mary* 5, that no weaver use, &c. So a subsequent act, which may be reconciled with a former, shall not be a repeal of it. Though there are negative words, as the stat. 1 & 2 *Philip and Mary* 10, that all trials shall be according to the course of the common law, and not otherwise, does not take away 35 H. 8, 2, for trial of treason beyond sea." *Hill v. Filking* (i) is a strong authority to the same effect. In *Foster's case* (j) Lord Coke says "Only it must be known, that forasmuch as acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act to be abrogated; *sed hujusmodi statuta tantd solennitate, et prudentia edita*, as (*Fortescue* speaks,) ought to be maintained and supported with a benign and favourable construction." In *Gregory's case* (k), "*Gregory* brought a writ of error against *Blackfield*; and the case was, that B. brought a plaint in the court of *Ludlow*, which was a court of record, against G., *tam pro domind Regind quam pro seipso*, on the stat. of 4 & 5 *Philip and Mary*, c. 5, which prohibits that none shall weave any woollen cloth or kersies, unless he hath been apprentice, or exercised the trade, &c. by seven years, upon pain of forfeiture of such cloth, or the value of it, the penalty to be recovered by action, &c. in any court of record; and three errors were assigned, first, that the said branch of the act was abrogated and taken away by the stat. of 5 *Eliz.* c. 4; *sed non allocatur*, for, *inspecto statuto*, they both stand together; and it was said, that a later statute in the affirmative shall not take away a former act; and *eo potius*, if the former be particular, and the latter general." *Stradling v. Morgan* (l) depended on the stat. 7 Ed. 6, c. 1, s. 15; and upon the subject of conflicting statutes, it is said, "And the judges of the law, in all times past, have so far pursued the intent of the makers of statutes, that they have expounded acts which were general, in words to be but particular, where the intent was particular." And further it is said, "From which cases it appears, that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter, they have adjudged to reach to some persons only; which expositions have always been founded on the intent of the legislature; which they have collected sometimes by considering the cause and necessity of

(g) 2 B. & Adol. 818.

(h) 5 Nev. & Man. 383; 1 Har. & Woll.

477.

(i) 10 Mod. 481.

(j) 11 Rep. 63 a.

(k) 6 Rep. 19 b.

(l) Plowd. 200.

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making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances; so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

R. V. Richards, in reply.—The cases relating to the construction of statutes need not be controverted. It may be admitted, that if one statute is repugnant to another, the latter must prevail; and if both can stand together, they should be so construed. The 42nd section of 3 & 4 W. 4, c. 27, is merely a re-enactment of the 21 J. 1, c. 16, including the limitation of the right to distrain. As to the argument that the plaintiffs are mortgagees claiming a sum charged on the land, it does not apply, for the plaintiffs claim the sum of money as rent due to the assignee of the reversion. It is said that the object of the former statute was to free land from incumbrances, but rent is not an incumbrance on land. Here the first act is general, and the last is particular, and this is clearly an action of covenant upon a speciality within the meaning of the 3 & 4 W. 4, c. 42, s. 3.

TINDAL, C. J.—I am disposed to rest my judgment upon the 3 & 4 W. 4, c. 42; and if I were required to decide whether this case falls within the provisions of the former statute, 3 & 4 W. 4, c. 27, I should say that there are strong reasons for holding that it does not. That statute is entitled, "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," and its several provisions appear rather to apply to the recovery of rents which are an actual charge upon the land, than to mere conventional rents. Thus the 1st section gives as the interpretation of the word rent, "that it shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land;" and it seems to me, that the 42nd section, when taken in conjunction with this, does not provide for conventional rents. Again, the 2nd section enacts, "that no person shall make an entry or distress, or bring any action to recover any land or rent," but within twenty years after the right first accrued; and it is clear that the word rent thus used in conjunction with the word land, applies to charges for which an assize or other real action will lie; It is also to be observed, that section 36. goes on to abolish real actions, and section 40. enacts that money charged upon land shall be deemed to be satisfied at the end of twenty years. It has been contended, that as section 41. provides that no arrears of dower shall be recovered for more than six years, the 42nd section must be taken to apply to all arrears of other kinds of rent; but I should be rather inclined to refer the rents mentioned in the 42nd section, to those kinds of rent which the title and preamble of the statute contemplate, and not to conventional rents.

But it is not necessary to give a precise opinion upon this point, because, if section 42. does include conventional rents, I am clearly of opinion, that the subsequent statute 3 & 4 W. 4, c. 42, has taken that species of rent out of the operation of the former statute. The 3 & 4 W. 4, c. 27, received the royal assent on the 24th July, 1833, and the provisions of the 42nd section came into operation after the 31st December, 1833; the 3 & 4 W. 4, c. 42,

received the royal assent on the 14th *August*, 1833, and took effect on the 1st *June*, 1833.

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A new and distinct enactment was therefore made by the later statute, which was to come into operation before the former statute took effect; and if there is any thing irreconcilable between the two statutes, it would be a singular proceeding that the law affecting certain rents should be altered after the expiration of so short a period, when the enactments of the earlier statute would take effect. The 3rd section of 3 & 4 W. 4, c. 42, declares that all actions of debt for rent upon an indenture of demise, and all actions of covenant or debt upon any bond or other specialty shall be commenced within ten years after the end of the then session of Parliament, or within twenty years after the cause of such action, but not after. Now these are not mere negative words; and thus we find, in *August*, 1833, a legislative declaration, that actions of debt for rent and covenant may be brought within ten years. Let it be assumed, for a moment, that the 42nd section of the former act included conventional rents, and there we find it declared, "That after the said 31st *December*, 1833, no arrears of rent, or of interest in respect of any legacy, or any damages in respect of such arrears of rent or interest shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due;"—taking this to be a general enactment, that no arrears of any kind of rent shall be recovered by any action, but within six years, then the subsequent declaration, that actions of covenant may be commenced within a longer period, is virtually an exception from the general terms of the former enactment. I admit we should reconcile the two statutes if it be possible; but if both contain affirmative enactments which are inconsistent, they cannot exist together, and the later must *pro tanto* repeal the former. Without, therefore, impeaching the validity of the former statute further than to give effect to the later, I am of opinion that the plea is bad, and judgment must be given for the plaintiffs.

PARK, J.—On the first point I am also inclined to be of opinion, that the case of a rent which is merely conventional, is not included in the provisions of the 42nd section of the 3 & 4 W. 4, c. 27, but I abstain from giving a precise opinion upon that point. If, however, it be included, I entirely agree that the subsequent enactment in 3 & 4 W. 4, c. 42, s. 3, is a virtual repeal of the former statute; that section is so extremely express in its language, that it exactly applies to the case which is now before us. When we find the legislature using inconsistent language in two acts of Parliament, we are bound to give an interpretation which is consistent with the later statute. Here the 3 & 4 W. 4, c. 42, s. 3, provides that all actions of covenant shall be commenced within ten years after the end of the then session of Parliament, but not after;—this is an action of covenant, and if there be any force in language, it must be subject to the limitation expressed in this section.

VAUGHAN, J.—I am of the same opinion. It is certainly desirable to give effect to both statutes, and make them consistent with each other; but if this cannot be done, then the last enactment must prevail. It is difficult to suppose that any contradiction was contemplated by the framers of these two statutes. I am inclined to read the first enactment as not applying to the case of a rent due on a specialty; but if there be any doubt upon this point, we must solve

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it by saying that the words of the later statute are so plain and unequivocal, that they must prevail.

BOSANQUET, J.—I agree that the plaintiffs are not restricted to the limitation of six years for the recovery of this rent. If these acts of Parliament can be construed consistently with each other, they ought to be so interpreted; but if they are inconsistent, then the later must prevail. If this case rested upon the construction of 3 & 4 W. 4, c. 27, I should entertain very considerable doubts whether the plaintiffs were not restricted from bringing this action after the expiration of six years. The *first* section of that statute defines the word rent, and it seems to me that this definition includes a rent service. The *second* section provides, "that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years after the right of action accrued to the claimant, or some person whose estate he claims;"—that appears to relate to an estate in the rent itself; and then there follow other provisions, which seem to apply to the recovery of arrearsages. Section 40. relates to the recovery of the principal sum, payable out of any land or rent;—section 41. to the recovery of arrears of dower; and section 42 to recovery of other arrears; it enacts, "that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgement of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." It is contended that this does not apply to rent reserved by specialty, and a decision on the 21 Jac. 1, c. 16, has been cited in support of this argument; but it is difficult to say that the language is such as to apply to the case of rent which is reserved by parol agreement, and not to extend to rent reserved on specialty; nor do I find that any provision is made in any other part of the statute for the recovery of arreages of rent, whether reserved by specialty or by parol. But it is not necessary to give any opinion upon this point, because if this be the true interpretation of the first statute, it is quite inconsistent with the second. It is difficult to say which of the two enactments is the most general, or most particular, in its terms. The words used in both are of a very general nature. The language of the later statute is, that in all actions of debt for rent upon any indenture of demise, and in all actions of covenant or debt upon any bond or other specialty, the time of limitation shall be ten years; and it would be a very strange interpretation to say that this particular covenant, which is contained in an indenture of demise, is not within this provision. But as this construction is wholly inconsistent with the former enactment, I cannot reconcile the two statutes, and the limitation of the right of action in this case must be in pursuance of the later enactment.

. Judgment for the plaintiffs.

## DOE d. ROGERS v. PULLEN.

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**EJECTMENT.** At the trial of the cause, before *Park, J.*, at the *London* sittings after *Trinity Term*, the lessor of the plaintiff proved that a week's notice to quit the premises sought to be recovered, had been given to the defendant. The question was, whether that notice was sufficient; or whether the defendant was a yearly tenant, and entitled to a six months' notice to quit. The facts were as follows:—

In *April*, 1829, the defendant had obtained a lease of the premises from one *Fisher*, for twenty-one years; and having made improvements on the premises, he assigned the lease to *Rogers*, as a security for money advanced, and at the same time *Rogers* executed an under-lease, dated 15th *September*, 1831, to the defendant, who continued in possession, and underlet part of the premises.

*Fisher* subsequently brought an action of ejectment against the defendant, in consequence of his having neglected to perform the covenants contained in the lease of *April*, 1829, and an arrangement was then agreed upon between *Fisher*, *Rogers*, and *Pullen*, to the following effect.—That *Pullen* should confess judgment in the ejectment, and that a new lease of the premises should be granted by *Fisher* to *Rogers*; and that *Rogers* should then grant a new under-lease to *Pullen*, upon being paid a sum of money which was due to him from *Pullen*. *Pullen*, with the knowledge of *Rogers*, at the same time agreed to underlet a part of the premises, at a yearly tenancy, to one *Clarke*. The lease to *Rogers* was accordingly executed by *Fisher*; and *Pullen*, who had never quitted the possession of the premises, formally gave up the key to *Fisher*, who returned it to him, saying, “Go on as usual; pay me the money you owe me, and then you shall have your lease.”

*Pullen* having neglected to pay his rent, after demand made, or the money which was due, the present action was brought; and the learned judge being of opinion that the notice to quit was sufficient, a verdict was found for the lessor of the plaintiff.

*Atcherley*, Serjt., obtained a rule *nisi* to enter a nonsuit, upon the ground that the defendant was a tenant from year to year, and was therefore entitled to a six months' notice to quit.

*Bompas*, Serjt., and *Erle* shewed cause.—The facts do not shew that the defendant was tenant from year to year. They prove a mere conditional agreement, that if the defendant paid the money which was due to *Rogers*, he should then have a lease of the premises. [*Bosanquet*, J.—At what rent did the defendant hold the premises?] That does not appear. In *Doe d. Moore v. Lasdner* (a), where there was a contract for the purchase of premises, payable by instalments, and on default of payment the former instalments were to be forfeited, and the seller to be released from his liability to execute an assignment, it was held, that the only tenancy which was applicable, was a tenancy by sufferance, and not a tenancy from year to year. So where the tenant's

A lessee for years mortgaged his estate, and his term having become forfeited, the superior landlord recovered the premises by ejectment, and granted a new lease to the mortgagee, who, having received possession of the premises from the mortgagor, returned the key of the house to him, saying, “Go on as before; pay me the money you owe me, and then you shall have a lease:”—*Held*, that this did not create a tenancy from year to year, and that upon non-payment of the money due, and no rent having been paid, the mortgagee was entitled to maintain an ejectment without six months' notice to quit.

(a) 1 Stark. N. P. C. 308.

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lease had expired, and he remained in possession pending a treaty for a further lease. *Regnart v. Porter* (b); *Dunk v. Hunter* (c); *Doe d. Hollingsworth v. Stennett* (d).

*Doe d. Price v. Price* (e) shews that before the new agreement was made with the lessor of the plaintiff, the defendant, as mortgagor, was liable to be turned out of possession, upon a demand of possession, without any notice to quit.

In *Clayton v. Blakey* (f), where it was held, that leases by parol for more than three years, enure as a tenancy from year to year, the defendant had held the premises for two or three years, under a parol demise for twenty-one years (g).

*Atcherley*, Serjt., and *Barstow*, in support of the rule.—When the lessor of the plaintiff told the defendant to go on as before, he must have meant that he was to go on under the terms contained in the under-lease of *September, 1831*, and under such circumstances a tenancy from year to year would be created. Suppose the case of the lease of a farm having expired, and the landlord tells the tenant to go on as before, to pay the rent and make repairs, and that he would grant a lease for twenty-one years, and then the tenant holds the estate and expends his capital, would not the tenant hold from year to year? [*Bosanquet*, J.—Would it not rather be an equitable purchase of a lease for twenty-one years? I remember a case which I tried at *Northampton*, under the following circumstances:—The defendant in ejectment had been tenant from year to year, at the rent of four guineas; he agreed, by writing, to purchase the premises, and paid ten shillings on account of the purchase, and afterwards continued in possession for four or five years without paying any rent, or any more of the purchase money. There had been a demand of possession before the action was brought, and I held it be sufficient, because I considered the agreement had altered the holding to a tenancy at will.] Here the parties contemplated the relationship of landlord and tenant; and, therefore, that case, and other cases which have been cited between vendor and vendee, are not applicable.

Here, by referring to the terms of the lease of 1831, a specific rent was payable, and a quarter's rent had been demanded. In *Roe d. Bree v. Lees* (h), *De Grey*, C. J., says, "All leases for uncertain terms are *prima facie* leases at will: it is the reservation of an annual rent that turns them into leases from year to year." *Doe d. Rigge v. Bell* (i); *Stomfil v. Hicks* (j); *Goodtill d. Gallaway v. Herbert* (k).

If something more than a mere tenancy at will had not been intended, the defendant might have been turned out of possession the next day; but the arrangement which was made with respect to *Clarke*, shews that a longer holding was contemplated.

(b) 7 Bing. 451.

(c) 5 B. & Ald. 322.

(d) 2 Esp. N. P. C. 716.

(e) 9 Bing. 366.

(f) 8 T. R. 3.

(g) In *Hamerton v. Stead*, 3 B. & Cress. 483, it is said by *Littledale*, J., "Where parties enter under a mere agreement for a future lease, they are tenants at will; and

if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract."

(h) W. Black. 1171.

(i) 5 T. R. 471.

(j) Salk. 413.

(k) 4 T. R. 680.

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TINDAL, C. J.—The only question is, whether the defendant entered into possession of these premises in the character of a tenant from year to year. It appears that the defendant had formerly been the lessee of the premises, and that he mortgaged his lease to the lessor of the plaintiff. The defendant's lease having become forfeited, it was agreed between the parties that a new lease should be granted by *Fisher* to the lessor of the plaintiff, and that the lessor of the plaintiff should grant the defendant, who remained in occupation of the premises, an under-lease for a term of years. The defendant then formally gave up possession of the premises, by giving the key to the lessor of the plaintiff, who, by returning it, put the defendant into possession again, using words which imported an express agreement, that upon his paying the money which had been secured by the mortgage, he should receive an under-lease of the premises. After the defendant had continued to occupy the premises for a short period, the lessor of the plaintiff gave him a week's notice to quit, and brought this ejectment. The question is, whether this was a tenancy from year to year. It appears to me that it was not. If the lessor of the plaintiff had promised to give the defendant a lease for fourteen years, then, according to *Clayton v. Blakey* (1), it might have given the defendant an interest as tenant from year to year, although the lease would not have been good, because it was not in writing. But the defendant was not put into possession under any such agreement; the intention was to spur him up to pay the money which was due; and under such a state of facts there is no room to imply a tenancy from year to year. It is said, that a tenant who holds over after the expiration of a term for years, goes on as tenant from year to year. That is so, because no other term can be implied; but *expressum facit cessare tacitum*. Here, if we determine that a tenancy from year to year was agreed upon, we should decide contrary to the intention of both the landlord and the tenant. Put this case more strongly in favour of the defendant, and suppose a written agreement, that upon the happening of a certain event he should have a lease of the premises. Under such an executory agreement, could we imply a tenancy from year to year? The doctrine laid down in *Doe d. Jackson v. Ashburner* (m), is applicable here. There it was held, that the construction of the agreement must depend upon the intention of the parties, and that the remedy to ensure the performance of the agreement was in a court of equity. The rule must be discharged.

VAUGHAN, J.—The question is, whether the defendant was not a mere tenant at will; it was a condition precedent, that the money should be paid, and if it had been paid, the parties contemplated a lease of the premises; but the condition never was performed, and therefore this is like the case of a vendor and vendee, and all the cases shew that the vendee is a trespasser after a demand of possession, on making default in paying the purchase money. In *Doe d. Moore v. Lawder* (n), it was held, that a vendee is a mere tenant by sufferance. Here the defendant did not perform the condition, and I am of opinion that the notice was sufficient to entitle the plaintiff to sustain an action of ejectment.

(1) 8 T. R. 3.

(m) 5 T. R. 163.

(n) 1 Stark. N. P. C. 338; and see *Doe d.*

*Milburn v. Edgar*, 1 Hodges, 437, and *Ball v. Cullimore*, 1 Gale, 96.



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BOSANQUET, J.—The simple question is, what construction ought to be put upon the language used by the lessor of the plaintiff, when he put the defendant into possession. It amounted to a prospective agreement; he told the defendant "to pay the money, and then he would give him a lease."

The defendant could not claim the lease until the money was paid. It is true, that it may be consistent with legal principles to suppose that the lessor of the plaintiff had subsequently let the premises to the defendant as tenant from year to year; but is that a rational supposition, when we see that the object of the lessor of the plaintiff was not to grant the lease until the debt was paid? It is not reasonable to suppose that he intended to grant him such an interest, which, without a notice, might last for the term of two years. It is said, that from the expression, "go on as before," we must intend that the rent payable under the former lease was reserved. But the former lease was at an end, and there was no ground for the defendant to say that he was let into possession, in any other way, than under an agreement that he should have a lease of the premises, when he paid the money which was owing.

PARK, J., having tried the cause, gave no opinion.

Rule discharged.

May 4th.

OAKLEY v. RIGBY.

Jobbing in foreign funds is not illegal by 7 G. 2, c. 8; that statute only refers to the stocks or other public securities of this kingdom.

ASSUMPSIT for work done and for commission due in respect thereof, for money paid to the defendant's use, for interest, and on an account stated.

Pleas—First, non-assumpsit. Second—That the said work was done and the commission became due, and the said money was paid and found to be due for and in respect of contracts and agreements knowingly made by the plaintiff, upon which, consideration, in the nature of premium, was, with the knowledge of the plaintiff, given for liberty to accept or refuse certain public and joint stock, and certain public securities and shares and interests in certain public securities, contrary to the form of the statute in such case made and provided. Conclusion with a verification.

Third plea—That the said work was done and the commission became due, and the said money was paid and was found to be due for and in respect of contracts in the nature of wagers, and contracts in the nature of putts and refusals, knowingly made by the plaintiff, relating to the then future price and value of certain public and joint stock, and certain public securities, contrary to the form of the statute in such case made and provided. Conclusion with a verification. Issue was joined on all the pleas.

At the trial, before *Tindal, C. J.*, at the *London* sittings, it appeared that the plaintiff, a stock-broker, had been employed by the defendant to make purchases of *Spanish* stock on his account. A verdict was found for the plaintiff; damages 525*l*.

Platt obtained a rule *nisi* to enter a nonsuit, upon the ground that the transaction between the plaintiff and defendant was illegal; first, by stat. 7 G. 2, c. 8; and, secondly, at common law (a).

(a) The rule was also granted on the ground that there was no evidence that the defendant had authorized the purchases, but nothing turned on that point.

Sir W. Follett, R. V. Richards, and Martin shewed cause. They were stopped by the Court.

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Platt and Barstow, in support of the rule.

I. This case is clearly within the mischief contemplated by stat. 2 G. 2, c. 8; if it is not, then a new game would not be included within the provisions of stat. 9 Anne, c. 14, which relates to money won by playing at cards or other games. In *Attorney General v. Saggors* (b), where, by stat. 8 Anne, c. 7, s. 17, a penalty was imposed on the importation of foreign goods which were prohibited in this country, it was held, that the act was prospective in its operation, and that it extended to all such goods as were prohibited by subsequent statutes. Foreign stocks and funds, which come within the description of "public securities," were in existence when stat. 2 G. 2, c. 8, was passed, and the last cited case proves that it is not because a statute is penal, that it shall not be prospective in its operation. In *Brown v. Turner* (c), it was held, that jobbing in *omnium* was within the statute; and although *Oliverson v. Coles* (d) may appear to be contrary, Lord *Ellenborough*, C. J., draws this distinction, namely, that a person who has *omnium*, is potentially in possession of stock. When the statute passed, *Bank Stock*, *East India Stock*, and *Irish Stock* was in existence. If the statute is not to have a general interpretation, it is difficult to say whether it would apply to *Irish Stock*, or to the *Greek Loan*, which is guaranteed by this country.

II. By the common law this was an illegal contract, and this objection may be taken, although the pleas are framed on the statute, *Rex v. Urly* (e). It is, in effect, a bet or wager on the price of stocks at a future day; and such practices operate as an incitement to immorality; and it would be contrary to good policy to afford encouragement to them. Thus, in *Gilbert v. Sykes* (f), it was held, that no action could be maintained where the payment of money depended upon a bet whether *Napoleon Bonaparte* would escape assassination. So in *Andrews v. Herne* (g), and in other cases which are collected in *Starkie on Evidence* (h). In fact, this traffic in *Spanish Bonds* amounts to a bet on the solvency or insolvency of a foreign state.

TINDAL, C. J.—It appears to me, that this case involves the same consideration as *Wells v. Porter* (i), which has been already decided during this term. I am unwilling, therefore, to go over the ground again, merely for the purpose of arriving at the same conclusion. I will only advert to two grounds of argument which have now been introduced; one founded on the statute of *Anne*, the other upon the case of the *Attorney General v. Saggors*. It has been contended, that if we were called upon to construe the statute 9 Anne, c. 14, we should be bound to hold, that any new game of cards which was not known at the time the Act passed, is within the mischief contemplated by that statute; and that it will be a contradiction, if we now decide that jobbing in foreign stocks is not within the mischief of the 2 G. 2, c. 8. But the statute of *Anne* applies to money "won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever," which are general words,

(b) 1 Price, 182.

(c) 7 T. R. 630; 2 Esp. N. P. C. 631.

S. C.

(d) 1 Stark. N. P. C. 496.

(e) 2 Saund. 308, n. 1.

(f) 16 East, 150.

(g) 1 Lev. 33.

(h) 2 Stark. 898.

(i) See post.

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sufficiently comprehensive to include any new game; but the words used in the other statute are not sufficient to include foreign securities.

Then, as to the case of the *Attorney-General v. Sagers (k)*; the Court there held, that a statute which was passed to impose penalties for running uncustomed goods, was applicable and applied to goods on which duties were imposed by subsequent acts. This statute was passed for the purpose of preventing uncustomed goods from being run, and it was a piece of machinery to assist in collecting the revenue, and it therefore applies *toties quoties*, as often as new duties are imposed. The case before us is very different. The statute, when it passed, was applicable to the stocks, funds, and public securities which were in this country at that time, and it cannot be seen that foreign funds were within the purview of the legislature.

PARK, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule discharged.

(k) 1 Price, 182.

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A. contracted to sell the plaintiff a quantity of oats to be shipped in Ireland by persons of whom A. had previously purchased the oats; and A. having informed the plaintiff that the oats were about to be shipped on board the *Gibraltar* packet, the plaintiff effected an insurance on the cargo with the defendant. A misunderstanding afterwards arose between A. and the plaintiff, as to the place at which the *Gibraltar* packet should discharge her cargo, she being bound for *Southampton*, but the plaintiff contending that he was entitled to receive the oats delivered at *Portsmouth*; A. thereupon sold the oats which were on board the *Gibraltar* to another person at *Southampton*, but the plaintiff gave notice to the purchaser that he insisted on having the oats forwarded to *Portsmouth*. It was subsequently ascertained that the *Gibraltar* packet and her cargo was totally lost on her passage from *Ireland*. The plaintiff afterwards sold his interest in the policy to A. Under these circumstances, it was held, that the plaintiff had an insurable interest, when the policy was effected, and that he was entitled to recover in an action against the underwriter.

ASSUMPSIT upon a policy of insurance, subscribed by defendant, as an underwriter, for 200*l*. The first count of the declaration averred that 500 barrels of oats were shipped at *Youghall*, on board the *Gibraltar* packet, to be carried and conveyed to *Southampton*; that the plaintiff was interested therein to the amount of the monies insured; and that the vessel departed and set sail from *Youghall* aforesaid, on her voyage towards *Southampton*, and was totally lost, with the oats on board, by perils of the sea. The second count averred the interest in the oats to be in one *Bamford*. The declaration was delivered before the late rules came into operation. The defendant pleaded the general issue. The parties to the action under a judge's order stated the facts in the following case for the opinion of the Court.

The plaintiff was a corn-merchant at *Cosham* in *Hampshire*. In October, 1831, *Bamford*, who was a corn-dealer at *Southampton*, now deceased, contracted with *Thomas John* and Son, merchants, of *Youghall*, in *Ireland*, through *M'Cheane*, who was the agent at *Portsmouth*, of *John* and Son, for the purchase of a parcel of black oats, from 500 to 700 barrels, as appeared by the following correspondence between *M'Cheane* and *John* and Son.

"*M'Cheane* to *John* and Son, *Portsmouth*, 22nd October, 1831."

"I have sold for you to Mr. *Bamford*, 500 to 700 barrels prepared black oats, as you can get a vessel to answer at 1*l*s. 6*d*. per barrel on board," &c.

"*John* and Son to *M'Cheane*, 26th October, 1831."

"We observe your sale to Mr. *Bamford* of 500 to 700 barrels of black oats, at 1*l*s. 6*d*. per barrel, which shall be shipped the first opportunity. The price low, as we now pay at 12*s*. per barrel, free on board here: you may sell 500 to 700 barrels more at 14*s*. 6*d*. per barrel," &c.

The plaintiff was entitled to receive the oats delivered at *Portsmouth*; A. thereupon sold the oats which were on board the *Gibraltar* to another person at *Southampton*, but the plaintiff gave notice to the purchaser that he insisted on having the oats forwarded to *Portsmouth*. It was subsequently ascertained that the *Gibraltar* packet and her cargo was totally lost on her passage from *Ireland*. The plaintiff afterwards sold his interest in the policy to A. Under these circumstances, it was held, that the plaintiff had an insurable interest, when the policy was effected, and that he was entitled to recover in an action against the underwriter.

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10th November, 1831, *Bamford* and the plaintiff entered into a negotiation (having met at *Portsea*), for the purchase of some black oats, and the following note was written and signed by the plaintiff in a book belonging to *Bamford*, which was usually carried about by him.

"Bought of Mr. *Bamford* 500 to 700 barrels of prepared black oats, at 11s. 9d. per barrel, to be shipped by *Andrew Carberry*, of *Dungarvon*, and 500 to 700 barrels of prepared black oats, at 11s. 9d. per barrel, to be shipped by *Thomas John* and Son, of *Youghall*, both parcels free on board, and freight not to exceed 2s.; if it does, Mr. *B.* to pay the addition. *Portsea*, 10th November, 1831. This is to cancel a former sale."

At the same time *Bamford* wrote in pencil, and handed to the plaintiff, the following note:—"Sold Mr. *J. H. Sparkes*, 500 to 700 barrels prepared black oats, at 11s. 9d. per barrel, on board, to be shipped by *Andrew Carberry*, and 500 to 700 barrels of prepared black oats, to be shipped by *Thomas John* and Son, at 11s. 9d. per barrel, at *Youghall*, freight not to exceed 2s. per quarter. *F. B. Bamford*, *Portsea*, 10th November, 1831. To cancel former sale by Mr. *Sparkes*, who is to have his bill returned."

At the time of signing these notes, *Bamford* did not know in what vessel the oats ordered by him of Messrs. *John* and Son, as before mentioned, would be shipped. The former sale referred to was a sale of oats by *Bamford* to *Sparkes*, to be delivered at *Portsmouth*, which delivery was not made in consequence of the master of the vessel, on board which those oats arrived, refusing to proceed to *Portsmouth*, and insisting on landing them at *Southampton*. To compensate *Sparkes* for this, *M'Cheane* negotiated the sale from *Bamford* to *Sparkes*, mentioned in the above notes.

14th of November, 1831, *Bamford* received a letter from *John* and Son, dated at *Youghall*, on the 10th of the same month, as follows:—"We have commenced shipping the black oats sold to you through Mr. *M'Cheane*, per schooner *Gibraltar* packet, of *Dartmouth*, *Thomas Metherell*, master, for *Southampton*. She will take from 500 to 600 barrels; and our next will inclose invoice and bill of lading."

On the same day *Bamford* addressed the following letter to the plaintiff:—"Southampton, 14th November, 1831. I am this day advised by *Thomas John* and Son that they have engaged room in the schooner *Gibraltar* packet, of *Dartmouth*, to take about 600 barrels black oats, on your account."

On the following day, 15th November, the plaintiff forwarded to his agent in London the following letter:—"Have the goodness to insure 400l. on oats per the *Gibraltar* packet, of *Dartmouth*, from *Youghall*, by *Southampton* and *Portsmouth*, supposed to be not yet loaded."

In pursuance of this order, a policy was effected on the 16th November, which was subscribed by the defendant, as underwriter, for 200l., and was the policy declared on in this cause. The premium mentioned in the policy was paid by the plaintiff's agent to the defendant. No other insurance was ever effected upon the parcel of 486 barrels of oats hereinafter mentioned, or any part of it, either by *Sparkes* or *Bamford*, or any other person.

Messrs. *John* and Son shipped on board the *Gibraltar* packet 485 barrels of black oats, being part of the oats referred to in their letter of the 14th of November, and also another parcel of 250 barrels black oats, and 200 barrels of barley; and the shipment was completed on the 14th of November, 1831. The following bill of lading, relating to the first-mentioned parcel only, was

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signed by the master, "Shipped, by *Thomas John* and Son, in the *Gibraltar* packet, of *Dartmouth*, whereof is master, *John Metherell*, and now in the port of *Youghall*, and bound for *Southampton*, say 486 barrels of black oats, and are to be delivered at the aforesaid port of *Southampton* (the danger of the seas, &c. excepted,) unto shipper's orders, or to assigns, he or they paying freight for the said goods 2s. per quarter, with primage and average accustomed. In witness, &c. Dated in *Youghall*, November 14th, 1831. *John Metherell*."

This bill of lading was indorsed generally by Messrs. *John* and Son, and forwarded to *M'Cheane*, together with the invoice of those 486 barrels of oats, and another invoice of the other parcel of 250 barrels of oats (which last-mentioned parcel formed no part of the 600 barrels referred to in the letter of *John* and Son, of the 14th November,) and 200 barrels of barley by the same vessel; and on receipt of this letter, *M'Cheane* addressed to *Bamford* the following letter:—"I have an invoice from *John* and Son to-day of 486 barrels of oats for you, per *Gibraltar* packet, which is all your berth would hold, although they thought it would have held 500 to 600 barrels. They also send me invoice of 250 barrels of oats, and 200 barrels barley, per same vessel, freight 2s., oats and barley, 2s. 6d., which they desire we give you at 11s. 6d. and 14s. 6d. if you will relinquish all claim on them for more barley; if not, I am to give you the 200 barrels barley, and the other barrels they will ship first opportunity. As this vessel will not come to *Portsmouth*, perhaps it will be as well for you to agree to their proposal, and supply *Sparkes* hereafter with others. Waiting your reply, &c."

Bamford to *M'Cheane*. "*Southampton*, November 21st. 1831. Your favour of the 19th is now before me; I wrote what *Johns* have done, and what they propose, but I have a right to the whole of the oats, or nearly so, according to my contract; and also have a right to full 300 barrels barley. Under these circumstances, however, I think it will be best to send *Sparke's* invoice, and draw on him for 736 barrels oats, per said vessel, and I will take the barley, and exonerate *Johns*, if *Sparkes* accepts. You are aware I have nothing to do with any vessel going to *Portsmouth* with either lot of oats for *Sparkes*. Write me on this."

On Monday, the same 21st of November, *M'Cheane* saw the plaintiff, and offered him the option of taking the 736 barrels mentioned in the above letter; but the plaintiff required that the *Gibraltar* packet should make the discharge in *Portsmouth*: when *M'Cheane* wrote to *Bamford* as follows:—"Monday evening. Mr. *Sparkes* will take the 736 barrels oats, at 11s. 6d., but he insists on the vessel coming into *Portsmouth*. Every one that he has spoken to on the subject, says, you are bound to ship them for *Portsmouth*."

On the same 21st November, 1831, *Bamford*, unknown to *Sparkes*, entered into a treaty with *E. L. Oke*, a corn-merchant of *Southampton*, to sell him 700 barrels of black oats; and upon that occasion a bought note was signed, as follows:—"Southampton, November 21st, 1831. Bought of *F. B. Bamford*, about 700 barrels of prepared black oats, free on board, at *Youghall*, shipped per the *Gibraltar* packet, at 2s. freight, price 12s. 3d. per barrel."

A sold-note, in the same form, was signed by *Bamford*, and handed to *Oke*.

The following letters then passed at the respective times at which they are dated.

Bamford to plaintiff. "*November* 22nd, 1831. I am exceedingly vexed that the *Gibraltar* packet will not go to *Portsmouth*: though I am not bound to

send her, or any other vessel to any particular port. I should be glad that one would go to you of course. I shall ship your oats according to my contract, and do all I can to get a vessel engaged to meet your wishes in the interim. If you want black oats, I will supply you out of my store with as many quarters as would be 600 barrels, at 11s. 9d. on board, at *Youghall*. Can I do more?"

Plaintiff to *Bamford*. "*Cosham*, near *Portsmouth*, 23rd November, 1831. By your letter of the 14th instant, you informed me that *John* and Son had engaged room on the *Gibraltar* packet for about 600 barrels of black oats on my account, and I immediately wrote to *London* for insurance to be effected on her for 400*l.*, which was done at 20*s.* per cent. On *Monday* last, Mr. *McCheane* told me there were two bulks in the *Gibraltar* packet, amounting to 736 barrels, which he offered me the option of taking, and I accepted them both. I must, therefore, insist on your sending on the *Gibraltar* packet to *Portsmouth*."

McCheane to *Bamford*. "*Portsmouth*, November 23rd. Your favour of 22nd came to hand. My orders from Messrs. *John* and Son are to give you the 250 barrels of oats, at 11*s.* 6*d.*, if you will exonerate them from shipping the 100 barrels barley which remain due to you (on your contract for 300 barrels), after the 200 barrels now on *Gibraltar* packet. Please say by post to-night, if you agree to this. I do not send documents, or draw, till I receive your answer, to save expense of stamps. You said in yours of 21st instant, you will agree to *John* and Son's proposition, if *Sparkes* accepted, but he has not, inasmuch as he insists on vessel coming to *Portsmouth*. The 250 barrels oats, and 200 barley, are insured for 340*l.* in *London*. You say, in yours of 22nd, *Sparkes* should wait till the 736 barrels are offered him. I offered them to him per your orders given 21st instant. *Sparkes* is at *Petersfield* market to-day, but I fear he will not be satisfied unless vessel comes on."

McCheane to *Bamford*. "*Portsmouth*, November 24th, 1831. I annex invoice of the 736 barrels of oats, 200 barrels barley, per *Gibraltar* packet, and enclose bills of lading and bill for amount, which please return to me as soon as in your power." Invoice 24th of *November* (on the back of the same letter). Invoice of 736 barrels oats, and 200 barrels barley, shipped by Messrs. *John* and Son, at *Youghall*, on board the *Gibraltar* packet of *Dartmouth*, *John Metherell* master, for *Southampton*, for account and risk of Mr. *F. B. Bamford*, *Southampton*."

On the same 24th of *November*, *Bamford* indorsed the bill of lading for the 483 barrels of oats, with the following document:—"Deliver the within named oats to Mr. *E. L. Oke*,—*F. B. Bamford*." The bill of lading with this indorsement was, without *Sparkes*'s knowledge, handed to *Oke*; and on the same day the following invoice was made out by *Bamford* to *Oke*. "Invoice of 736 barrels prepared black oats, shipped by *Thomas John* and Son, of *Youghall*, free on board the *Gibraltar* packet, of *Dartmouth*, *John Metherell* master, per account and risk of Mr. *Oke*, *Southampton*." Here followed particulars, and among them a charge of 5*l.* for insurance on 500*l.* The price at which the said oats were sold by *Bamford* to *Oke*, viz. 11*s.* 3*d.* per barrel, was the market value of the said oats on the 21st of *November*, 1831. The value of the 486 barrels in question, with all the additional charges in the above last-mentioned invoice (except the sum of 5*l.* 9*s.* 9*d.* for insurance,) was 321*l.* 16*s.* 4*d.* *Bamford* had not in fact effected any policy for 500*l.* as stated in the invoice,

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but was an insurer to *Oke* of the 736 barrels of oats for that sum. On the same 24th of *November*, 1831, a bill was drawn by *Bamford* on *Oke* for 478*l.* 14*s.* 4*d.* being the amount of the above invoice. That bill was accepted by *Oke*, and fell due on the 17th of *January*, and was then paid. The following letters were written and received according to their respective dates.

The plaintiff to *Oke*. "26th of *November*, 1831. I shall be obliged if you will inform me when the *Gibraltar* packet arrives at *Southampton* from *Youghall*, and if you observe any one presuming to touch the black oats on board, which I shall endeavour to obtain, *coute qu'il coute*."

Oke to *Sparkes*. "27th *November*, 1831. The black oats per *Gibraltar* packet, Mr. *Bamford* has sold to me, and insurance effected thereon."

The plaintiff to *Oke*. "28th of *November*, 1831. It is very unpleasant to differ with one's friends, but I am determined to try the case with Mr. *Bamford*; therefore, if the *Gibraltar* packet does not deliver the oats to me, I shall immediately take such steps as my attorney may advise."

About the 16th of *December*, it was generally believed that the *Gibraltar* packet was lost. She sailed from *Youghall* to *Southampton*, on the 16th of *November*, but the master or crew have never since been heard of, and it was admitted that she was totally lost. On the 16th of *November*, 1831, the policy of insurance was sent to the plaintiff by his *London* agent; and about the 16th of *April*, 1832, the same was, after a long dispute, handed over to *Bamford*, and the following indorsement put upon it, and signed by the plaintiff and *Bamford*. "By this indorsement, the interest on this policy is vested in Mr. *F. H. Bamford*." At the time that indorsement was made, the plaintiff received 60*l.* consideration for it. The defendant and the other underwriters had not in any way assented to or been apprised, until the action was brought, of the above-mentioned indorsement being put on the policy.

The premium was paid into court.

The Court was to decide as to the admissibility of all or any of the foregoing letters; and also to form the same conclusions as to all or any of the facts herein stated, as a jury would be at liberty to do at *nisi prius*. If the Court should decide that the plaintiff, under the circumstances, was entitled to the whole sum of 400*l.* insured upon the policy, the judgment was to be for 200*l.*

If the court should decide that the plaintiff was entitled only to such a proportion of the sum insured as 486, which was the quantity of oats actually on board, bore to 600, which was the quantity of oats intended to be insured for 400*l.*, the judgment was to be entered for 162*l.* And, if the Court should decide that the plaintiff was not entitled to recover, the judgment was to be entered for the defendant.

Talfourd, Serjt. for the plaintiff.—A complete contract was entered into between the plaintiff and *Bamford*, by the agreement of the 10th of *November*, and the plaintiff afterwards effected an insurance on the oats to *Southampton* and *Portsmouth*.

If the transaction had rested there, no doubt would have existed that the plaintiff had an insurable interest in the goods; and it would make no difference whether the interest was legal or equitable. *Smith v. Lascelles*(a), where *Ashurst*, J. says, "The plaintiff had only mortgaged his interest in the

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goods and freight to the defendant; and therefore although the defendant may have insured the legal interest on his own account, he might also have insured the equitable interest remaining in the plaintiff on the plaintiff's account." It clearly appears by the plaintiff's letter of the 26th November, that he insisted on his right to have the oats, and the loss of the vessel was not then known. But if it be admitted that *Bamford* had an interest in the oats, then that is sufficient to support the policy, and it is one of those cases where the policy will enure for the benefit of the party who was really interested. *Lucena v. Craufurd* (b), *Routh v. Thompson* (c). The principle laid down in *Hagedorn v. Oliverson* (d) is applicable. There the plaintiff effected an insurance on a ship, as well in his own name as in the name of every other person, in the usual form, for the benefit of one *Schroeder*, an alien enemy, and procured a license to legalize the voyage; a loss happened, and ten years afterwards *Schroeder* adopted the insurance, and it was held that the plaintiff might recover against the underwriter, averring the interest to be in *Schroeder*.

Maule, contrà.—The plaintiff had no insurable interest in the oats. He might have supposed that the oats were shipped from *Ireland* in pursuance of the contract which he had made with *Bamford*; but, by that contract, the goods were to be forwarded to *Portsmouth*; and the oats which were shipped in the *Gibraltar* packet, were consigned to *Bamford*, at *Southampton*, and not to *Sparkes*, at *Portsmouth*. Therefore the insurable interest was in *Bamford*, and he will not be allowed to adopt the plaintiff's insurance after a loss has happened. When an insurance is effected, and it turns out that the party had no insurable interest, the premiums are returned, subject to a small deduction of one half per cent., and the broker's fees; but if the plaintiff is now permitted to recover, the underwriter would be compelled to return the premiums, and also to pay for the loss which has been sustained. Here the policy was not effected to cover *Bamford's* interest. In *Irving v. Richardson* (e), Lord Tenterden, C. J., left it to the jury to say whether a mortgagee of a ship who had insured beyond the amount of his mortgage debt, intended to cover the interest of the mortgagor, as well as his own, and the Court held, that the direction was correct. That principle is applicable to the present case, and it cannot be pretended that the plaintiff had any view to *Bamford's* interest when he effected the insurance. *Bamford* had, without doubt, such an interest as to enable him to insure, but he did not insure; and it would be dishonest to permit him now to recover on a policy which was effected by the plaintiff, and which he has purchased, since the loss, for 60*l*. The bought and sold note exchanged between the plaintiff and *Bamford* is silent as to the place at which the oats were to be delivered; but there can be no doubt but that the understanding of the parties was that the delivery should be at *Portsmouth*. The plaintiff had no right to insist that the cargo of the *Gibraltar* packet should be delivered at *Portsmouth*. *Idle v. Thornton* (f). If *Bamford* neglected to deliver oats to the plaintiff in pursuance of his contract, then the latter has now a right of action against *Bamford* for the non-performance of that contract.

(b) 2 New Rep. 268; S. C. in Error, 1 Taunt. 325.

(c) 13 East, 274.

(d) 2 M. & S. 485.

(e) 2 Barn. & Adol. 193.

(f) 3 Camp. 274.

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Talfourd, Serjt., in reply.—It is clear the plaintiff had an insurable interest in the goods when he effected the insurance, and he did nothing afterwards to shew that he intended to repudiate the contract. *Alexander v. Gardner* (g).
Cur. adv. vult.

TINDAL, C. J.—Upon the facts stated in the special case, two objections have been made by the defendant against the plaintiff's right to recover; first, that at the time of effecting the insurance, the plaintiff had no insurable interest in the oats shipped on board the *Gibraltar* packet, and had sustained no loss in respect of them, so as to entitle him to maintain the action as to the first count; and, secondly, that *Bamford* was a stranger to the insurance, and had no such interest in the oats at the time of the supposed loss, and had sustained no such damage as to entitle the plaintiff to maintain the action on the second count of the declaration. If the first objection is determined in favour of the plaintiff, it becomes unnecessary to consider the second. For if the plaintiff had an insurable interest at the time the policy was effected, whatever change may have taken place in the property in the oats since, can have no effect in relieving the underwriters from their liability, as the plaintiff may sue on the policy for the benefit of the party to whom such property has passed. And, we think, looking at the situation of the parties, and the effect of the correspondence which has passed between them, that the plaintiff had an insurable interest in the oats upon which the policy was effected. The question turns upon the right of the plaintiff, at the time of effecting the policy, to the specific cargo of oats on board the *Gibraltar* packet.

The plaintiff contends, those particular oats were appropriated to him; the defendant, on the other hand, contends that no specific cargo of oats was appropriated, that he had only a right of action against *Bamford* on the bought and sold note for the non-delivery of oats at *Portsmouth*, and that he could recover the same damages now in such action, notwithstanding the loss of the *Gibraltar* packet. Under the bought and sold notes which were entered into on the 10th November, there was no interest acquired in any particular. Nothing more was specified than that they were oats to be shipped by *Thomas John* and Son, of *Youghall*; and (as we think must be inferred from necessary intendment upon the face of the contract,) that the oats were to be delivered at *Portsmouth*. This latter condition appears abundantly afterwards from the correspondence between the contracting parties. Four days afterwards, *Bamford*, the vendor, has notice that the oats which he intended as the subject-matter of the contract, at the time such contract was entered into, were shipping for him by Messrs. *Thomas John* and Co., at *Youghall*, on board the *Gibraltar* packet, bound to *Southampton*; and by the same post, *Bamford* writes to the plaintiff, that Messrs. *Thomas John* and Son have engaged room in the *Gibraltar* packet, to take about 600 barrels of oats on his account.

This letter appears to us to be an unequivocal appropriation of the oats on board the *Gibraltar* packet, by *Bamford*, the only person who had the control over them. And this appropriation is assented to and adopted by the plaintiff, who, on the following day gives instructions to his agent in *London* to effect the policy on oats, per *Gibraltar* packet, from *Youghall*, to *Southampton*.

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and *Portsmouth*. It is true that *Bamford* concealed from the plaintiff the fact that the vessel was bound only to *Southampton*; but as he entered into a contract to deliver oats, which were afterwards fixed between the parties to be these oats at *Portsmouth*, the plaintiff had the right to hold him to his bargain, and to call upon him either to procure the *Gibraltar* packet to bring them on to *Portsmouth*, or to forward them by some other vessel to the place of delivery; as the concealment that the *Gibraltar* packet was not bound to *Portsmouth*, could not upon any legal principle divest from the plaintiff the interest he had in these specific oats. Accordingly the plaintiff, continually from this time until after the loss of the oats, insists upon these particular oats being forwarded to *Portsmouth*. The letters from *M'Cheane* to *Bamford* of the 21st and 23rd of *November*, and the plaintiff's letter of the 23rd, are precise and peremptory on the point, insisting on these particular oats being forwarded by the *Gibraltar* packet. On looking at the whole of the transaction, we see no assent on the part of the plaintiff to vary his right or claim to those particular oats, until after the policy is effected, and the loss known. And we are not aware of any principle on which a change in the interest, after the policy is effected, much less after the loss has happened, can be set up as an answer by the underwriters against a claim for such loss. We therefore think, upon the facts stated in the case, the plaintiff is entitled to judgment for 162*l*.

Judgment for the plaintiff.

HEWISON and an^r. Assignees of GEO. MICKLE, a Bankrupt,
and JOHN MICKLE, v. GUTHRIE.

April 30th.

TROVER to recover a policy of insurance. The declaration stated, that after the bankruptcy of *George Mickle*, to wit, on the 23rd of *January*, 1835, *L. Hewison* and *C. Smith*, as assignees of *George Mickle*, and the plaintiff, *John Mickle*, were lawfully possessed as of the property of them the said *L. Hewison* and *C. Smith* as such assignees as aforesaid, and the said *J. Mickle*, of a certain policy of insurance, whereby *Guthrie* and *Chalmers*, agents, as well in their own name as for and in the name and names of all and every other person or persons to whom the same should appertain, &c., did make assurance &c. upon the ship *Diadem*; and being so possessed thereof, the plaintiffs afterwards, to wit, on the same day, casually lost the said policy of insurance out of their possession, &c.

Plea.—That the defendant, before and at the time when the said *George Mickle* became bankrupt, and from thence until and at the time of the said supposed conversion in the said declaration mentioned, carried on and still carries on the trade and business of merchant and insurance agent, in the city of *London*, under the style and firm of *Guthrie* and *Chalmers*, and that there

In trover by the assignees of a bankrupt to recover a policy of insurance, the defendant pleaded a custom for insurance brokers to have a general lien upon policies of insurance in their possession for their general balance; that mutual dealings and accounts existed between the bankrupt and the defendant; and that at the time of the conversion the

bankrupt was indebted to the defendant in 200*l*. Replication—that the 200*l*. was the price of goods sold to the bankrupt upon twelve months' credit; and that a bill of exchange was drawn and accepted in payment, which bill was not due at the time of the conversion. *Held*, first, that by taking the security the lien was gone; secondly, that the defendant could not rest his defence upon the statute relating to mutual credits, (6 G. 4, c. 16, s. 50,) without specially pleading the facts; thirdly, that if the plea of mutual credits were set up, then it could not succeed, because it did not appear that the balance was due at the time of the bankruptcy.

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is an ancient and laudable usage and custom of merchants, in the said city of *London*, for all insurance agents who shall effect policies of insurance on behalf of others, to have a general lien upon such policies of insurance in their possession for their general balance. That previous to and at the time when the said policy of insurance, in the said declaration mentioned, was effected by the said defendant as hereinafter mentioned, and before and until the said *G. Mickle* became bankrupt, the said defendant was accustomed to deal with the said *G. Mickle*, on his and the said *G. Mickle's* own and separate account, and not with the said *G. Mickle* and the said plaintiff *John Mickle* jointly: and that mutual accounts, before and at the time of the said policy of insurance being effected by the said defendant, for and on account of the said *G. Mickle*, as hereinafter mentioned, existed between the said defendant and *G. Mickle* only, and not between the said defendant and the said *G. Mickle*, and the said plaintiff, *J. Mickle*, jointly: and that whilst such mutual dealings and accounts, as aforesaid, existed between him and the said *G. Mickle*, and before the said *G. Mickle* became bankrupt, to wit, on the 22nd of *April*, 1833, the said *G. Mickle* solely, and on his own separate account, and not jointly with the said plaintiff *J. Mickle*, gave an order to the said defendant to effect the said policy of insurance, in the said declaration mentioned, for him the said *G. Mickle*, and on his account, and without any notice that the said plaintiff *J. Mickle* had any concern or interest whatsoever in the said policy of insurance, and the said *G. Mickle* concealed from the said defendant that any other person had any concern or interest in the said insurance.

And the defendant further said, that he, having so received such order as aforesaid, afterwards, to wit, on the 14th *May*, 1833, effected the said policy of insurance on the credit and account of the said *G. Mickle* alone, and not for the said *G. Mickle* and the said plaintiff *J. Mickle* jointly, and without any notice or knowledge that the said plaintiff *J. Mickle* was in any manner concerned or interested in the said policy. That from the time of the said policy of insurance being effected, hitherto, the said policy of insurance had constantly remained in the possession of the said defendant; and that at the time of the request and refusal to deliver the said policy, and the said supposed conversion, in the said declaration mentioned, the said *G. Mickle* was indebted to the said defendant on the general balance of accounts between them in a large amount, to wit, the sum of 200*l.*; and that by the said usage and custom of merchants, the said defendant had a lien to the extent of the said debt upon the said policy in the said declaration mentioned, and was entitled to retain the same until such lien as aforesaid was satisfied. That at the time the said policy was so converted, as in the declaration was mentioned, the said defendant gave notice to the said plaintiffs of his said lien, and refused to deliver the same to the said plaintiffs until the same was satisfied, as he lawfully might for the cause aforesaid. Yet the said plaintiffs wholly neglected and refused to pay or satisfy the said lien; whereupon the said defendant refused to deliver to the said plaintiffs the said policy, as in the said declaration is mentioned, which was the said supposed conversion in the said declaration mentioned, and that the defendant was ready to verify.

Replication.—That the said sum of 200*l.* in the said plea mentioned, was and is the price and value of certain canvass before then sold and delivered, by the said defendant, to the said *G. Mickle*, at his request; and that the said canvass was sold and delivered by the said defendant to the said *G. Mickle*

upon a credit of twelve months from the time of such sale and delivery, and which credit had not expired at the time of the said conversion. That at the time of the said sale and delivery of the said canvass, to wit, on the 31st of January, 1834, the said defendant, for and on account of the price of the said canvass, made and drew a certain bill of exchange in writing upon the said *G. Mickle*, whereby the defendant requested the said *G. Mickle* to pay to him or his order the sum of 204*l.* 10*s.* 6*d.*, being the price of the said canvass, twelve months after the date thereof, which period had not elapsed at the time of the said conversion in the declaration mentioned, or at the time of the commencement of this suit; which said bill of exchange the said *G. Mickle*, before his bankruptcy, and before the said conversion, to wit, on the said last-mentioned day, accepted and delivered to the defendant for and on account of the said canvass, and which the defendant then received and accepted of and from the said *G. Mickle*, for and on account of the price of the said canvass; and that the plaintiffs were ready to verify, &c.

Demurrer and joinder in demurrer.

Sir *Wm. Follett*, in support of the demurrer.—This is a case of mutual credit between the bankrupt and the defendant, which gave a right to the latter to retain the policy as a security for the balance due to him.—*Ex parte Deeze* (a), *French v. Fenn* (b), *Atkinson v. Elliott* (c), *Parker v. Carter* (d), *Olive v. Smith* (e), *Gibson v. Bell* (f). It may be said that the debt does not appear to have been due at the time of the bankruptcy: but it is immaterial whether it was then due or not; the only question being, whether this is not a “mutual credit” within sections fifty and fifty-one of the Bankrupt Act, 6 G. 4, c. 16.

Bompas, Serjt. *contrà*.—The defendant's right of lien was gone when he accepted the bill of exchange, payable at a future day, as a security for the money due from the bankrupt. In *Cowell v. Simpson* (g) it was held that a solicitor's lien on papers was superseded by taking security, and Lord *Eldon* observes—“In the case of a factor, who has a lien both for his expenditure upon the goods in his possession and his general balance upon former transactions, entering into a special contract for a particular mode of payment, he loses the lien. In various trades the demand being for work and labour applied in some instances upon the particular goods, and others upon other goods also, though the possession had been given up, it is universally laid down, that if that takes place under a special agreement, there is no such lien: and if it commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing, the one contract destroys the other.” *Weldon v. Gould* (h), *Worrall v. Johnson* (i), *Stevenson v. Blakelock* (j), *Chase v. Westmore* (k), *Houghton v. Matthews* (l), are to the same effect. The point which has been raised, that this account discloses a mutual credit, under the Bankrupt Act, cannot be raised upon these pleadings: the defendant ought to have pleaded the particular facts which entitled him to treat his transactions with the bankrupt as amounting to a mutual credit,

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(a) 1 Atk. 228.

(b) 1 Cooke's Bankrupt Laws, 565, 8th ed.

(c) 7 T. Rep. 378.

(d) 1 Cooke's Bankrupt Laws, 573, 8th ed.

(e) 5 Taunt. 56.

(f) 1 Bing. N. C. 743; 1 Hodges, 136.

(g) 16 Vesey, 275.

(h) 3 Esp. N. P. C. 267.

(i) 2 Jac. & Wal. 214.

(j) 1 M. & S. 535.

(k) 5 M. & S. 180.

(l) 3 Bos. & P. 465.

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within the 50 & 51. secs. of the statute. But if this were not so, the defendant would not be entitled to succeed on that ground; here the debt does not appear to have been due to the defendant, at the time of the bankruptcy, and all the cases which have been cited are distinguishable. *Ex parte Ockenden* (m) is contrary to *Ex parte Deeze* (n); and *Rose v. Hart* (o), *Sampson v. Burton* (p), *Rose v. Sims* (q), *Clarke v. Fell* (r), are authorities to show that this transaction could not be brought within the meaning of a mutual credit.

Sir Wm. Follett, in reply.—It may be admitted that the lien cannot be set up in consequence of the security being given; but the whole of the facts appear upon the pleadings, and they disclose such a dealing between the bankrupt and the defendant, as to entitle the latter to the benefit of the 50 and 51 sections of the Bankrupt Act. *Rose v. Hart* (o) was overruled by *Gibson v. Bell* (t).

Cur. adv. vult.

TINDAL, C. J.—We think the question in this case must be disposed of upon a ground which will make it unnecessary to consider many of the points which have come into discussion before us.

The plaintiffs declare in trover for a policy of insurance; and the defendant, by his plea, alleges an ancient custom in the city of *London*, for insurance brokers to retain in their possession all policies effected by them, under a lien for their general balance, and then sets up the balance due to him at the time of the demand and refusal. The plaintiff, in his replication, states, that the sum for which the lien is claimed is the price of some canvass which the defendant had sold at a credit of twelve months, which credit had not expired at the time of the conversion; and further, that the defendant had drawn a bill of exchange at twelve months upon the bankrupt, the purchaser of the canvass, which bill was accepted by him, and was received by the defendant on account of the price of the canvass, before the time of the conversion. To which replication the defendant demurs.

Now it is well established, by the authorities cited at the bar, that if a security is taken for the debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone.

The case of *Cowell v. Simpson* (u), and the authority of Lord *Eldon*, in applying the doctrine there laid down to the case of factors and other traders, is decisive on the point. But if the defendant has lost by his own act the right to retain as a lien, upon which he relies in his plea under a particular custom of the city of *London*, he cannot be allowed to desert his plea, and rest his defence upon another and totally distinct ground, viz., a right to retain the property in question for a balance due to him on mutual credit between himself and the bankrupt. Even if the facts of the case would have warranted such a defence, he was as much bound to plead the particular facts, and bring himself within the clause of the statute relating to mutual credits, as to plead the custom which he has actually set up, and to endeavour to bring himself within such custom. And although it has been argued at the bar, that the general

(m) 1 Atk. 234.

(n) 1 Atk. 228.

(o) 8 Taunt. 499.

(p) 2 Brod. & Bing. 89.

(q) 1 B. & Ado. 521.

(r) 1 Nev. & M. 244.

(t) 1 Bing. N. C. 743; 1 Hodges, 136.

(u) 16 Ves. 275.

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balance for which the lien is claimed is virtually and substantially a balance upon mutual credit between the parties, yet it has been answered, and we think satisfactorily answered, that it does not appear on the record that the mutual credits upon the result of which the balance is claimed, were given before the bankruptcy, so as to make the balance claimed a balance due at the time of the bankruptcy; the only allegation being, that the bankrupt was indebted to the defendant in this general balance "at the time of the request and refusal to deliver the policy, and of the supposed conversion." Even, therefore, admitting the defendant might set up this right to retain the policy for his general balance, under a plea of mutual credit, we think the facts pleaded upon the record do not bring the case within that principle. We therefore give judgment for the plaintiffs.

Judgment for the plaintiffs.

HOLLIS and Wife, Executrix of J. DAVIES, deceased, v. PALMER.

April 29th.

ASSUMPSIT on a promissory-note. The declaration stated, that the defendant theretofore, and in the lifetime of *John Davies*, to wit, on the 26th July, 1819, made his promissory-note in writing, and delivered the same to the said *J. Davies*, and thereby promised to pay to the said *J. Davies*, or his order, on demand, the sum of 127*l.* 10*s.* 8*d.* for value received for goods, with interest for the same, from the day of the date of the said promissory-note. And the defendant then, in consideration of the premises, promised the said *J. Davies*, in his lifetime, to pay him the amount of the said note according to the tenor and effect thereof; yet the defendant disregarded his promise, and did not pay the amount of the said note and interest, or any part thereof, to *J. Davies*, in his lifetime, or to the said *Thomas Hollis* and *Charlotte* his wife, executrix as aforesaid, or either of them, since the death of *J. Davies*, except interest on the said note, at the rate of 5*l.* per cent., from the day of the date of the said note, up to a certain day within six years next before the commencement of this suit, to wit, the 26th of April, 1830; and which interest was within six years next before the commencement of this suit, to wit, on the said last mentioned day, paid by the defendant to the said *J. Davies*, in his lifetime.

In assumpsit for money due on a promissory note, payable with interest; the declaration stated, that the defendant had not paid the amount of the note and interest, "except interest on the said note from its date up to a certain day within six years next before the commencement of the suit." The defendant pleaded the Statute of Limitations in the usual form, and upon a demurrer to the plea it was held, that the plea was good, because the interest was accessory to the principal money; and the allegation of the payment of the interest was merely a statement of evidence, which might or might not take the case out of the statute; and *semble*, that the

Plea.—That the said cause of action in the declaration mentioned, did not, nor did any part thereof, accrue at any time within six years next before the commencement of this suit, in manner and form as the plaintiffs had above thereof complained. Conclusion with a verification.

Demurrer and joinder.

Peacock, in support of the demurrer.—The Statute of Limitations bars the remedy, not the debt, *Higgins v. Scott* (a). In *Spears v. Hartley* (b), it was held, that a right of lien may exist, although the Statute of Limitations has barred the remedy to recover the debt. [*Tindal*, C. J.—The Statute of

(a) 2 B. & Adol. 413.

(b) 3 Esp. 81.

allegation of payment of interest was introduced prematurely, and need not be noticed in the plea.

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Limitations does not apply to liens: it says, that all actions shall be brought within six years after the cause of action.] Secondly, The plaintiffs are entitled to interest upon this note, *de die in diem*, and the payment of interest within six years is sufficient to take a case out of the Statute of Limitations, *Bealy v. Greenslade* (c); and that even to the extent of shewing an acknowledgment by all the joint makers of a note. *Burleigh v. Stott* (d), *Pease v. Hirst* (e). Here the plea admits the payment of the interest within six years, and therefore the statute does not operate as a bar; and if the plea is bad as to part of the debt, it is bad as to the whole of it. A note payable on demand with interest until paid, is not demandable instantly; and in *Gasoyne v. Smith* (f), it was held, that such a note is not to be considered as overdue, and liable to equities between the parties. *Barough v. White* (g), *Heywood v. Watson* (h).

*Stephen, Serjt., contrd.*—What is the contract set out in the declaration? It is, that the defendant promised to pay a sum of money due on a note, with interest. The principal and interest grow out of the same contract, and the interest is accessory to the principal, and cannot be separated from it. If the recovery of the principal is barred by the operation of the Statute of Limitations, the right to recover the interest is barred also. The declaration is of a very artful description, and is framed to entrap the defendant.

It is difficult to meet it by the plea, for if the defendant denies that interest has been paid, the issue is taken upon that fact. If it is not denied, then the present objection is raised, namely, that the plea does not answer the whole of the declaration. The payment of interest is only evidence from which a promise to pay the principal may be inferred; but such a stratagem as is now attempted will not be encouraged. There is a rule in pleading which is applicable to this case, namely, that if any matter is introduced prematurely it need not be noticed. *Sir Ralph Bovy's case* (i). There, in debt upon an escape, the plaintiff set forth in his declaration a voluntary escape; the defendant pleaded that he took him upon a fresh pursuit, to which there was a demurrer, because the defendant did not traverse the voluntary escape, "and it was resolved for the defendant; for it is impertinent in the plaintiff to allege it, and no ways necessary to his action. 'Tis out of time to set it forth in the declaration, but it should have come in the replication. 'Tis like leaping (as *Hale*, Chief Justice, said) before one come to the stile, as if in debt upon a bond the plaintiff should declare, that at the time of sealing and delivery of the bond the defendant was of full age; and the defendant should plead *deins* age without traversing the plaintiff's allegation." *Harvey v. Reynold* (j).

*Peacock, in reply.*—The declaration is not drawn with a view to surprise or entrap the defendant; it is now the usual mode of pleading to give the defendant credit for sums paid, to save the costs of an issue on a plea of payment, which the plaintiff would otherwise be obliged to pay. The allegation that the interest was paid, was also necessary to shew that the plaintiff had treated it as a continuing security, and not as a note which was overdue. A

(c) 2 Cr. & J. 61.  
 (d) 8 B. & Cress. 36.  
 (e) 10 B. & Cress. 122.  
 (f) 1 M'Leland & Y. 338.

(g) 4 B. & Cress. 325.  
 (h) 4 Bing. 496.  
 (i) Ventris, 217; 3 Keb. S. C. 55.  
 (j) Latch, 200.

distinction is always taken between a note payable with interest, and one which is not; in the latter case a defendant cannot be arrested for the interest; in the former he may, and the jury are not obliged to give interest by way of damages, unless the note specifies that interest shall be paid.

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TINDAL, C. J.—The objection in this case arises on the plea of the Statute of Limitations, which is pleaded in the ordinary form, namely, that the cause of action did not accrue at any time within six years next before the commencement of the suit. Two objections are made. The first is, that the plea is no answer to the statement in the declaration, because it admits that the interest is due. That argument proceeds on the supposition that you may sever the ground on which the principal and the interest arises; but this is not an argument which ought to prevail, for the principal and the interest have always been treated as arising out of one and the same contract. The interest is merely accessory to the loan.

The second objection is, that the plea is no bar. The declaration is not drawn in the usual form, but it states, that the defendant did not pay the amount of the note and interest, “except interest on the said note, at the rate of 5*l.* per cent. from the day of the date of the said note, up to a certain day within six years next before the commencement of the suit, to wit, the 26th of April, 1830; and which interest was within six years next before the commencement of this suit paid by the defendant to the said J. Davies in his lifetime.” Now this is put in a very vague manner; *versatur in generalibus*. The question is, whether the plea is an answer to the whole declaration. Now what is the cause of action? The answer is, that a promissory-note is the cause of action. The interest is not the cause, but the payment of it is a fact which may shew that the cause of action subsists. The legal effect of the payment of interest appears, by stat. 9 G. 4, c. 14, s. 1, which contains a proviso, that nothing therein contained should alter or take away, or lessen the effect of any payment of any principal or interest. The payment of interest since this statute, has therefore the same effect which it had before. But how can it be said whether it affords a presumption that the principal is still due, unless the circumstances which accompanied the payment are known. It is only a medium of proof, and consequently, this declaration merely discloses evidence, which *may* take the case out of the operation of the statute. I am, therefore, of opinion, that our judgment must be for the defendant.

PARK, J.—The declaration contains an allegation as to the payment of interest, which, as it appears by stat. 9 G. 4, c. 14, is merely matter of evidence. If this declaration were allowed, the effect would be, that the question of fact, as to the payment of interest, would be withdrawn from the consideration of the jury. It is not a usual mode of drawing a declaration, and I am of opinion that the plea is good, and answers the whole cause of action.

VAUGHAN, J.—I am of the same opinion. The plea is substantially an answer to the whole declaration: The interest is merely accessory to the principal.

BOSANQUET, J.—The interest must follow the principal, to which it is merely accessory: *accessorium sequitur suum principale*. If the argument for



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the plaintiffs could be supported, it would be somewhat extraordinary, that since the statute was passed, no person has brought an action to recover a debt under similar circumstances; and the absence of all authority upon this point is a strong ground to support our judgment. The allegation in the declaration, as to the payment of interest, merely amounts to evidence which is not conclusive of a promise to pay the note. Another answer is, that the allegation is premature, and need not be noticed in the plea.

Judgment for the defendant.

April 19th.

### FENN v. GRAFTON and an<sup>r</sup>.

In an action on the case, the plaintiff declared that he was possessed of a "messuage and premises," with the appurtenances; the plea traversed this allegation, and at the trial it appeared that the plaintiff had the separate use and occupation of only one floor of a dwelling-house:—*Held*, that the evidence did not negative the allegation that the plaintiff was possessed of a messuage.

Whether the declaration was subject to a special demurrer, on the ground of uncertainty, by the improper use of the word *messuage*, *quære*.

**CASE.** The declaration stated, that the plaintiff, before and at and after the time of committing the grievances thereafter mentioned, was lawfully possessed of a certain messuage and premises, with the appurtenances, situate in *Coleman Street*, in the city of *London*, and in which said messuage and premises the plaintiff and his family had, during all the time aforesaid, resided and dwelt; nevertheless, the defendants contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in the possession, use, occupation, and enjoyment of his said messuage and premises, and to render the same incommodious, unfit for habitation, and of little or no use or value to the plaintiff, whilst the plaintiff was so possessed thereof, and so resided or dwelt with his family aforesaid, to wit, on, &c., wrongfully and unjustly threw, poured, or spilt, and caused and procured to be thrown, poured, or spilt, large quantities of water near a certain room or rooms of the plaintiff, in, upon, and belonging to the said messuage or premises of the plaintiff, in so careless, negligent, and improper a manner, that, by reason thereof, afterwards, to wit, on, &c., and on divers other times afterwards, and before the commencement of this suit, divers large quantities of water ran and flowed from the landing place or stairs down to, upon, against, and into the said room and rooms in the said messuage and premises of the plaintiff, and the walls, floors, wainscotings, furniture, carpets, carpeting, papering, stairs, doors, and other parts thereof, and thereon being, and thereby greatly weakened, injured, wetted, and damaged the said messuage and premises of the said plaintiff, and the said walls, floors, &c. thereof, and wrongfully and improperly made great noises and disturbances near to and adjoining the plaintiff's dwelling-house and rooms thereof respectively belonging to the said plaintiff; and by reason of the premises, the said room and rooms in the said messuage and premises of the said plaintiff became and were incommodious and less fit for habitation, and also by reason of the premises, the plaintiff lost a lodger, &c. The defendants pleaded, that the plaintiff was not possessed of the messuage and premises, with the appurtenances, in the declaration mentioned, in manner and form as he had in that behalf above alleged, &c. Issue thereon.

At the trial, before *Tindal*, C. J., at the *London* sittings after *Hilary Term*, it appeared that the plaintiff occupied the shop and second floor of a house in *Coleman Street*, and that the defendants occupied the remainder of the premises. The occupation of each party was separate and distinct, and each held under the same landlord. There was but one staircase and one outer door belonging to the premises, which were used in common. The jury found a verdict for the plaintiff; damages 20*l*.

*Bompas, Serjt.* in pursuance of leave reserved, moved for a rule nisi to enter a nonsuit, upon the ground that the issue which was raised had not been proved; inasmuch as it appeared that the plaintiff was not possessed of a message. He contended that the evidence shewed, that the word message was improperly used in the declaration; and that the defendants were misled by the description, and were prevented from pleading their right to occupy the other parts of the premises.

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Cur. adv. vult.

TINDAL, C. J.—The issue raised is, whether the plaintiff was possessed of the message and premises, with the appurtenances, in the declaration mentioned, *modo et forma*; and the question is, whether this issue is supported by the evidence; for the objection of uncertainty in the improper use of the word message, could only be taken advantage of upon special demurrer. It appeared, at the trial, that the plaintiff was not possessed of the whole of the house, but that he had the separate use and occupation of one of the floors and other parts of it; and that the defendants had the exclusive use of the remainder of the premises. Now, although the word message may import more than the word dwelling-house, it does not necessarily happen that it must do so. It is frequently used synonymously with that word, as in conveyances, where “all that message or dwelling-house” is a usual mode of description; and if the declaration had stated that the plaintiff was possessed of a dwelling-house, there can be no doubt but that the allegation would have been supported by the evidence. Lord Coke (a) says, “Likewise a chamber or room, be it upper or lower, wherein any person doth inhabit or dwell, is *domus mansionalis* in law.” In *Termes de la Ley* (b), it is said, “that a house and a message differ, in that a house cannot be intended other than the matter of building; but a message shall be said all the mansion place, and the curtilage shall be taken as parcel of the message.” And *Spelman*, in his *Glossary*, tit. *Messuagium*, after stating it is properly a dwelling-house, with land, adds, “*transfertur ad honestum quodvis domicilium sine prædrio; unde et ædes urbicas ‘messuagia’ nuncupamus.*” We, therefore, think that the verdict ought not to be disturbed.

Rule refused.

(a) 3 Inst. 65.

(b) Title ‘Mease,’ 428.

## WESTON v. FOSTER.

April 28th.

ASSUMPSIT for money lent, for money paid, for interest, and for money found to be due on an account stated.

1. It cannot be proved under a plea of non-assumpsit that a bond was accepted by the plaintiff, in satisfaction of money which was lent and advanced two days before

Pleas.—First, *non assumpsit*; second, that after the making of the promises in the declaration mentioned, and before the commencement of the suit, to wit, on the 5th of August, 1834, an account was stated between the plaintiff and defendant of and concerning the said several sums of money in the declaration mentioned, being such account stated as in the declaration was men-

the bond was given.

2. In assumpsit for money lent, the defendant pleaded that the plaintiff accepted a bottomry bond in satisfaction and discharge of the debt; it was proved that a bond was given, but only as an additional security for the money lent, and after verdict for the plaintiff the Court refused to grant a new trial.

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tioned; and, upon that accounting, the defendant was then found to be in arrear and indebted to the plaintiff in the sum of 406*l*. That the causes of action in the declaration mentioned, so far as related to the said sum of 406*l*. parcel, &c., arose and accrued to the plaintiff for and in respect of certain disbursements made for and on account of a certain brig or vessel of the plaintiff, called the *Elizabeth*, whereof *Robert Fortune* was master and commander, then lying and being off *Sierra Leone*, on the coast of *Africa*, and monies supplied for the purposes of enabling her to sail and proceed in a certain then intended voyage on which she was about to proceed, to wit, from *Sierra Leone* aforesaid to *England*, and for interest on such monies respectively. That afterwards, and after such account had been and was so stated as aforesaid, and before the vessel set sail from *Sierra Leone* on her said intended voyage, and before the commencement of this suit, to wit, on 5th *August*, 1834, aforesaid, the said *Robert Fortune* so being such master and commander of the said brig or vessel, did, for and on account of the said several causes of action in the declaration mentioned, so far as the same related to the said sum of 406*l*. parcel, &c., make and seal, and as his act and deed, deliver to the plaintiff, the said *Robert Fortune's* certain writing obligatory, commonly called a bottomry bond, in the penal sum of 812*l*. under and subject to a certain condition thereunder written, whereby, after reciting that the vessel *Elizabeth*, whereof the said *Robert Fortune* was master, was then bound home and forthwith to depart on her return voyage to *England*, and that in consequence of the great sickness and mortality that had prevailed amongst the crew of the said brig, and the detention and expense arising therefrom, the disbursements of the vessel had amounted to an unusually large sum, and that the owner of the brig had not furnished the master with the means of paying the same and proceeding on his intended voyage; and thereupon the master was incapacitated to take up money for supplying the brig for her intended voyage, which voyage and employment the owner of the brig had consented and agreed to; and that the plaintiff had paid and lent unto the said master the sum of 406*l*. of lawful money of that colony, and was contented and agreed to stand to and bear the hazard and adventure thereof, on the hull or body of the said ship during the voyage, so as the same did not exceed three calendar months from the first day of the then present month of *August* to be accounted; the condition of the said writing obligatory was declared to be such, that if the said vessel should and did accordingly, with all convenient speed, proceed and sail on her said voyage to *England* (the damages and casualties of the seas excepted); and also if the said *Robert Fortune*, his heirs, executors, and administrators, did and should, within ten days next after the return and arrival of the said brig or vessel at her port of delivery from her said intended voyage, or at the end and expiration of three calendar months as aforesaid, which of the said terms should first and next happen, well and truly pay, or cause to be paid, to the plaintiff, his executors, administrators, or assigns, the sum of 406*l*., together with 20*l*. of like lawful money for every calendar month the said brig should be out on the voyage, over and above three calendar months, to the expiration of six calendar months, to be accounted as aforesaid, and so in proportion for less than a month; or if in the said voyage, and within the said three calendar months, to be accounted as aforesaid, an utter loss of the said ship or vessel by fire, enemies, or casualties, should unavoidably happen, to be sufficiently

proved by the said *Robert Fortune*, his heirs, executors, or administrators, then the said writing obligatory was to be void, otherwise to remain in full force and effect; which said writing obligatory the plaintiff then, to wit, on the said 5th of *August* aforesaid, accepted and received of and from the said *Robert Fortune*, in full satisfaction and discharge of the said several promises in the declaration mentioned, as to the said sum of 406*l.*, and of all damages and sums of money thereupon due and owing, or accrued.

A loss of the vessel on her homeward voyage, within the meaning of the condition, was then averred in the usual form, concluding with a verification.

Replication:—To the first plea, a *similiter*; to the second, that the plaintiff did not accept or receive, of and from the said *Robert Fortune*, the said writing obligatory in full satisfaction and discharge of the several promises in the declaration mentioned, as to the said sum of 406*l.* parcel, &c., in manner and form as the defendant had in and by his second plea in that behalf alleged.

At the trial, before *Park, J.*, at the *London* sittings after last *Trinity* Term, it was in evidence that, on the 4th of *August*, 1834, *Fortune*, the master of the brig *Elizabeth*, drew bills at *Sierra Leone* on the defendant in *England*, payable thirty days after sight, to the amount of 338*l.*, which bills he indorsed to the plaintiff, whose agent at *Sierra Leone* had advanced him that amount to enable him to meet the necessary expenses of the vessel, which was then about to proceed on her homeward voyage. On the 6th of *August*, the plaintiff's agent required the master of the vessel to give him the bottomry-bond mentioned in the plea, but he retained the bills of exchange, which were duly remitted to *England*. The 406*l.* mentioned in the bond, consisted of the 338*l.* advanced, and 68*l.* maritime interest for the risk.

The vessel was lost on her homeward voyage, and the bills of exchange having been dishonoured, this action was brought. The jury found a verdict for the plaintiff on both issues, damages 338*l.*

Taddy, Serjt., obtained a rule *nisi* for a new trial, upon the ground that the whole of the facts which were proved shewed but one transaction, and that the bond appeared to have been accepted in satisfaction of the simple contract debt. In answer to an objection made for the plaintiff at the trial, that the bond was void, he relied upon the case of the *Tartar* (a), as showing that such a bond could have been enforced.

F. Kelly and *Butt* shewed cause.—This is not a motion in arrest of judgment, and the question whether the bond is or is not void, does not now arise. If it did, *Abbot on Shipping*, 125, 5th ed. shows that the bond was void. But it is a sufficient answer to this application to say, that if the defendant had intended to show that the simple contract debt was merged in the higher security, it ought to have been specially pleaded, *Reg. Hil. T. 4 W. 4. l. Assumpsit*. Each issue must be separately considered, and at the trial the defendant chiefly relied upon the second, namely, that the bond was accepted in satisfaction of the debt; but now that the jury have decided that question in favour of the plaintiff, the defendant cannot take the objection of merger, under the plea of non-assumpsit.

Taddy, Serjt., and *Andrews, Serjt.*, *contrà*.—The plea of non-assumpsit operates "as a denial in fact of the express contract or promise alleged, or of

(a) 1 Haggard Adm. Rep. 1.

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the matters of fact from which the contract or promise alleged may be implied by law." That means the *whole* of the matters of fact. [*Tindal*, C. J.—The matter of fact asserted in the declaration is the lending of the money. You desire to import new matter *dehors* that.] The plaintiff did not prove any express contract, but all the facts were in evidence to raise an implied promise by the defendant; and when these facts are looked at, it will appear that the simple contract debt merged in the bottomry-bond; and this bond could have been enforced. Case of the *Tartar* (b).

TINDAL, C. J.—This is an action of assumpsit for money lent, and the defendant has pleaded, first, *non-assumpsit*; and, secondly, that after the making of the promises stated in the declaration, an account was stated between the plaintiff and the defendant, and that the plaintiff then accepted and received a certain bond in satisfaction and discharge of the amount which was then found to be due. An issue is raised upon each of these pleas, and both have been determined in favour of the plaintiff.

In considering the effect of the verdict, each issue must be separately considered; for the allegation in one plea, must not be taken for the purpose of ekeing out the other. I will take the last issue first. Upon that issue the jury have found that the plaintiff did not accept the bond in satisfaction and discharge of the promises stated in the declaration; and the evidence seems to warrant that finding. It is clear that the plaintiff had a good cause of action against the defendant on the 4th of *August*, and it was not until two days afterwards that the bottomry bond was given: one of the plaintiff's witnesses stated that the bond was given as a collateral security, and if there were evidence on the other side, the jury would have considered it, but as they have found that the bond was not given in satisfaction of the debt, their decision must be conclusive. I will now consider the first issue, upon the plea of *non-assumpsit*. It is contended, for the defendant, that it may be shewn under this plea, that the money was not lent and advanced in the manner stated in the declaration, but on another and different security. But, upon referring to the rules of pleading, it seems to me that such a defence is excluded. The late rule is, "In all actions of assumpsit, except on bills of exchange and promissory-notes, the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." Here the only fact stated in the declaration is the lending and paying of the money; if the defendant desired to shew that, after the money was advanced, the bottomry-bond was negotiated and accepted, so as to vary the original debt, he should have pleaded it specially. One of the examples given is "in an action of *indebitatus assumpsit* for goods sold and delivered, the plea of non-assumpsit will operate as a denial of the sale and delivery in point of fact: in the like action for money had and received, it will operate as a denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant, a receipt to the use of the plaintiff." Under this plea, a defendant would not therefore be authorized to prove that, after the sale of goods, a bond was given for the price of them, so as to alter the situation of the parties; but he may show that the goods were never sold, or

never delivered. For these reasons I am of opinion that this rule must be discharged.

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VAUGHAN, J.—Upon these issues, the jury could not find any other verdict. The plea of non-assumpsit only put in issue the receipt of the money. As to the other issue, it is whether the plaintiff accepted the bottomry-bond in satisfaction and discharge of the debt; and that was a question peculiarly for the consideration of the jury. The evidence was all on one side, and the plaintiff has properly obtained a verdict.

BOSANQUET, J.—I am also of opinion that there is no ground for disturbing this verdict. The plea of non-assumpsit is no longer a general issue. It is true that if the bond had been given at the time the money was advanced, the implied contract to pay the money which is stated in the declaration would not have arisen, and the money would have been lent on the special security. But the evidence shewed that it was the plaintiff's intention to have the benefit of both securities, and that the bond was demanded as an additional security. The second issue involved a mere matter of fact, and it does not appear by the evidence that the verdict was wrong. The plaintiff's intention seems to have been to obtain an additional security for the advances which he had previously made.

PARK, J.—I am of the same opinion, and at the trial I was perfectly satisfied with the verdict.

Rule discharged.

May 6th.

ON a subsequent day in this term, *Taddy*, Serjt., obtained a rule *nisi* to arrest the judgment in the foregoing case (a).

1. Rule 65 H. T. 2 W. 4, directs "that no motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term:—*Semble*, that this rule does not apply to causes tried out of term.

*Butt* shewed cause.—This application was made too late. By rule 65 Hil. T. 2 W. 4, it is directed, "that no motion in arrest of judgment, or for judgment, *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term." This rule is applicable to the present case; but if that is not so, then, by the practice of the Court, this motion ought to have been made within the first four days of the term ensuing the trial, as was determined in the Exchequer Chamber, in *Lane v. Crockett* (b).

*Taddy*, Serjt.—The rule of court is only applicable to cases which are tried in term; the first part of the rule cannot be said to apply to cases tried out of term, and as jury process is now always returnable in term, the latter part of the

(a) The Court refused to grant the rule (b) 7 Price, 566.  
for a replader.

2. Before this rule of court, in causes tried out of term, the practice in the Common Pleas was to move in arrest of judgment within the first four days of the following term; and, therefore, a rule to arrest the judgment was discharged, where it had been obtained more than four days after the commencement of the term following the trial.

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rule must also apply to cases tried in term. In *Anonymous* (c), it was held, that when a cause is tried in term, and the jury process is also returnable in term, the motion in arrest of judgment must be made within the term, though there be not four days to move. But if a case is tried out of term, then the rule is different. In *Taylor v. Whitehead* (d), it is said, that "after some consideration and conference with the master, the Court declared their opinion, that a motion in arrest of judgment may be made at any time before judgment is entered up" (e). *Lyte v. Rivers* (f) applies to a trial in term. [*Bo-sanquet, J.*—The old practice is stated in *Tidd's Practice*, 919, 920; and upon the passages which there state the practice in the three courts, the new rule was framed in order to attain a uniformity of practice. Whether the words of the rule are sufficient to effect this object may be doubtful.]

TINDAL, C. J.—This application either falls within the new rule as to moving in arrest of judgment, or it must be governed by the old practice. If it be within the rule, and I cannot see clearly that it is, then it is expressly directed that no motion in arrest of judgment shall be allowed after four days from the time of trial, if there are so many days in term.

But if the rule only applies to trials which take place at the sittings in term, then the old practice of the Court must be considered, and it appears to me, from the books of practice, that if a cause was tried at the assizes, or the sittings out of term, then the parties had only the first four days of the next term to make a motion to arrest the judgment. It must be admitted that, by the practice in the Court of King's Bench, it would seem by the case of *Taylor v. Whitehead*, (d) that a motion to arrest the judgment might be made at any time before judgment was signed; but when I look at the case I cannot think it is entitled to any great weight. That was an action of trespass, in which there was a plea of the general issue, and also two special pleas, and the jury found a verdict for the plaintiff on the general issue, and on one of the special pleas; and the plaintiff afterwards applied for leave to enter up judgment on the issue found for the defendant, *non obstante veredicto*, which may no doubt be applied for at any time before judgment; and that application was treated as being analogous to a motion in arrest of judgment. My doubt upon this decision is increased when I learn from my brother *Park*, who has had great experience, that the invariable practice has been to reserve the right of moving in arrest of judgment at the time of moving for a new trial. At all events, there can be no doubt as to what was the practice of this Court, and this rule must be discharged.

PARK, J.—I am of the same opinion. As to the practice in moving for arrest of judgment, it was the constant course in the Court of King's Bench not to include the motion in arrest of judgment in the rule for a new trial, but the grounds of the application were stated, and leave was reserved to make it on a future occasion, if it should be necessary; and I was somewhat surprised to find, when I came into this court, that, for the purpose of saving expense, the rule was drawn up in the alternative, for a new trial or to arrest

(c) Salk. 77.

(d) Douglas, 745.

(e) And see *Lumby v. Allday*, 1 Tyrwhitt, 217, where a rule was granted in arrest of

judgment, after a rule for a nonsuit was discharged.

(f) Barnes, 445.

the judgment. The case cited cannot, therefore, be considered an authority. I abstain from giving any opinion on the rule of court, because I doubt whether it is framed to meet this particular case.

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VAUGHAN, J.—I am of the same opinion. It is very doubtful whether the rule of court extends beyond causes which are tried in term; there can be no doubt but that the object of the rule was to assimilate the practice of the courts. As respects the old practice, the most sensible rule is laid down in *Lane v. Crockett (g)*, and it has always been followed in this court.

BOSANQUET, J.—It is altogether unnecessary to consider the construction of the rule of court, because the application is too late, according to the old practice. It appears that the rule is supposed to be applicable only to causes which are tried in term; but the intention of the framers of the rule was to extend it to all causes, in consequence of seeing the three passages in *Tidd's Practice*, to which I have already referred.

Rule discharged.

(g) 7 Price, 567.

### CLARKE v. TAYLOR.

April 23rd.

CASE for a libel. The declaration stated, that the plaintiff was a person of good name, fame, and credit, and had not been guilty, or, until the time of the committing of the several grievances by defendant as thereafter mentioned, been suspected to have been guilty of the offences and misconduct thereafter mentioned, to have been charged upon, and imputed to, the plaintiff, or of any other such offences and misconduct: that before and at the time of the committing the grievances thereafter mentioned, the plaintiff used, exercised, and carried on the trade and business of a warehouseman, and had always conducted himself, in his said trade and business, in an upright, fair, and honourable manner, and was honestly acquiring great gains and profits in his said trade and business; yet the defendants, well knowing the premises, but wickedly and maliciously intending to injure the plaintiff, and to cause it to be suspected and believed that the plaintiff had been and was guilty of the offences and misconduct thereafter mentioned to have been imputed to him, on the 27th of *December*, 1834, falsely, wickedly, and maliciously did compose and publish, and caused and procured to be composed and published, in a certain newspaper, to wit, the *Manchester Guardian*, of and concerning the plaintiff, and of and concerning him in relation to his said trade and business, a certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, defamatory, and libellous matters following, of and concerning the plaintiff, and of and concerning him in relation to his said trade and business, that is to say:—"Grand Swindling Concern. During the present week a most artful and deep-laid scheme for obtaining goods without the intention of paying for them, has been detected in this town. Generally speaking, plots of this nature are confined to men equally destitute of property and of character; but the one to which we now allude appears to have been devised by parties having the command of considerable funds, and possessing thereby the means of giving to their iniquitous

Where a libel is justified in part, the test to try if the justification be complete, is to read the part which is not justified, by itself, without reference to the other parts; and if it does not clearly amount to a libel, the justification is complete. If the part which is not justified contains ambiguous statements, the Court will not draw any libellous inference from them. If the plaintiff has not done so in his declaration.



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design a sanction which they could not otherwise have possessed. A few days ago there came to the *Mosley Arms* inn, in this town, a person calling himself Mr. *Edward Clarke*, (meaning the plaintiff,) and professing to be a principal in the firm of *Edward Clarke & Co.*, warehousemen, *Bucklersbury, London*. His, (meaning the plaintiff's,) declared object here was to buy manufactured goods; and he was accompanied by a Mr. *Newman*, as a buyer of *Manchester* goods, and a Mr. *Musgrove*, as buyer of woollens. It is, perhaps, necessary to state, at the outset, that there is not the slightest reason for believing that either of these individuals had any knowledge of his, (meaning the plaintiff's,) real character, having been engaged by him a very short time before his arrival here, in consequence of an advertisement which he had inserted in a newspaper. On their arrival in *Manchester*, Mr. *Newman*, (who is known here from the circumstance of his having previously been buyer for a respectable *London* firm,) introduced Mr. *Clarke*, (meaning the plaintiff,) to a considerable number of houses in different branches of business. *Clarke's*, (meaning the plaintiff's,) story was, that he had a capital of about 3000*l.*, with which he was commencing business as a warehouseman; that his funds had been in the first instance transmitted to *Leeds*, where he had laid out the greater part of them, as from the state of business in that town he found he could obtain a greater discount than in *Manchester*. He, (meaning the plaintiff,) had, however, a credit on Messrs. *Jones, Lloyd, & Co.*, to the extent of about 1000*l.* From two or three parties on whom he called, small purchases were made, and were paid for by checks on *Jones, Lloyd, & Co.*, which were duly honoured. From other parties he, (meaning the plaintiff,) proposed to buy largely on the terms of credit which are usual in the trade. Amongst others, he, (meaning the plaintiff,) called on Messrs. *Taylor, Son, & Gibson*, of *High Street*, where he bought a parcel of woollens, &c., amounting to about 1000*l.*, referring them to their own establishment in *London*, where he said he was well known. He, (meaning the plaintiff,) went also to Messrs. *Potters & Norris*, *Canon Street*, where he looked out goods worth about 1400*l.*, and gave them a reference to *Taylor, Son, & Gibson*. Mr. *Norris*, who had shewn him the goods, consequently sent to those gentlemen, who expressed their surprise at the reference, as they said Mr. *Clarke*, (meaning the plaintiff,) must know that they had not had time to receive an answer from *London*. In consequence of this reply, Mr. *Norris* sent for *Newman*, and he came, accompanied by *Clarke*, (meaning the plaintiff,) who said that he supposed Mr. *Norris* might entertain some doubts, and he was therefore come to answer any inquiries that might be made. When told of the reply of *Taylor, Son, & Gibson* to the inquiries which had been made, *Clarke*, (meaning the plaintiff,) said that their house in *London*, to whom he was well known, had promised to write on his behalf to the house in *Manchester*, which he supposed they had neglected to do. Mr. *Norris* then asked him, (meaning the plaintiff,) for a reference to some party in *London* to whom he would himself apply, and *Clarke* gave the name of a stockbroker to whom he said he was well known. He, (meaning the plaintiff,) also stated that he had been some time in the service of a Mr. *Jones*, a draper in *Tottenham Court Road, London*, whom he left about eighteen months ago, and had since been living upon his property. It happened that there was also at the time in *Manchester*, Mr. *Trueman*, of the firm of *Llewelyn, Trueman, & Co.*, warehousemen, who was about returning to *London*, and Mr. *Norris* requested him to make inquiries from Mr. *Jones*, the draper in *Tottenham Court Road*, as to the character and circumstances of Mr.

*Edward Clarke*, (meaning the plaintiff.) *Mr. Trueman*, accordingly, on his arrival in *London*, sent a clerk to make the necessary inquiries from *Mr. Jones*, who stated that *Clarke* had lived with him about three years, and had left him about eighteen months ago; that his conduct had always been unexceptionable; that he was ignorant of the extent of his property, but knew that his connexions were highly respectable. The result of this inquiry was communicated by *Mr. Trueman* to Messrs. *Potters & Norris*, by the post, which arrived here on *Tuesday* last. By the post there came to *Manchester*, a letter directed '*Mr. Clarke, Mosley Arms, Manchester*,' which was delivered according to its address. It very fortunately happened, however, that in addition to '*Mr. Edward Clarke*,' (meaning the plaintiff,) there was then stopping at the *Mosley Arms* another *Mr. Clarke*, who was better known there, and to whom the letter was, by mistake, delivered. It was without signature, (though, perhaps, the writer may be guessed at,) and was in the following terms:—

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" 'Dear ———, I was very anxious for your letter, which I received this morning, and the rather as I received none yesterday, which argued badly. Your letter I considered as disastrous as could be, inasmuch as it did not say that the 1000*l.* you had selected at *Gibson's* would be sent—omitted all mention of *Musgrove's* brother—informed me you had expended 300*l.*'s worth in shooting at 'birds in a bush;' and, finally, I had received no letter by this post from the house whom you had referred to me. Judge further of my consternation, when in the afternoon *Llewelyn's* clerk, the *Llewelyn*, came up and said he was desired by their house, requested by *Potters* and somebody, to make inquiries into the respectability of *Mr. Edward Clarke*, who had referred said *Potters* to me. Here was a *Scylla* and *Charybdis* to steer betwixt! On the one hand to say what was necessary, and the other to say nothing to commit myself. If I erred, it was by sailing too close to the rocks of *Scylla*, by saying too much; but I hope subsequent precaution will repair the damage, and preserve our keel unbroken. They had no idea that it was the *Edward Clarke*—the 'real pig.' It was not for me to inform them that it was the same, only in a new character. It is, therefore, well you did not settle with them; and you see in this another instance of the advantage of procrastination—my doctrine. If you had attempted to make the donkey speak, you would have been swamped at once, and have been blown directly. I have 200*l.* by me, and shall have 50*l.* more on *Monday* night, and will pay 250*l.* into *Lloyd's* on that day, but I shall give no order respecting it to them. Trust not to making 1000*l.* a-year; 'tis fallacious. *Llewelyns* will know you when they see you; and though they are paid by you, they will set themselves right with the *Potters*. *Deacon* has been here bothering, but I gave him his *quietus*. Buy all you can; don't trust to second journees, and don't burn this letter. I must see it destroyed when you return. I am in great haste, for the postman is gone past some time. *Mrs. C.* was here just now. I gave her your letter, and 5*l.* credit with me.'

" As may be readily supposed, the gentleman into whose hands this precious epistle had fallen, was, at first, no little puzzled with its contents; he, therefore, shewed it to some other gentlemen who were in the commercial room, and all they could make out of it was, that some scheme of roguery was in progress. They were engaged in discussing it when *Newman* entered

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the room, and the letter being handed to him, he at once perceived that he had been made the unwilling instrument of a gang of swindlers. He immediately took the course which any honest man would take under the circumstances. He went to all the parties from whom goods had been purchased, and communicated to them the discovery which had taken place. Fortunately this communication was in time to prevent any goods, except those which had been paid for, from falling into the hands of Mr. *Clarke's*, (meaning the plaintiff's,) *London* confederates. One or two parcels had been delivered to the carriers, but the sellers were enabled to stop them *in transitu*; but one person who had sold some fustians to *Clarke*, (meaning the plaintiff,) obtained the money from him on *Wednesday* morning, by threatening to hand him over to a police officer if the demand was not complied with. *Clarke*, (meaning the plaintiff,) himself departed for *London*, by the *Peveril* coach, on *Wednesday*, having made a very bad speculation of his *Manchester* trip, particularly as he had, in one or two cases, made a part payment in cash for goods which he had bought, and which are now held by the sellers for the balance. As we have already stated, *Clarke*, (meaning the plaintiff,) had been at *Leeds* for one or two days before his arrival in this town, and is supposed to have made considerable purchases there. It is hoped, however, that the detection of his plans in *Manchester* will be learnt in time to prevent any very serious losses from taking place. There is one circumstance, connected with this business, which shows how deeply the scheme of fraud had been laid, and how cautious parties should be in their inquiries respecting strangers. We have already stated, that *Clarke*, (meaning the plaintiff,) referred Mr. *Norris* to a stockbroker in *London*, a Mr. *Peacock*, we believe, to whom Mr. *Norris* wrote for information respecting *Clarke's*, (meaning the plaintiff's,) circumstances. He received a reply from Mr. *Peacock*, stating that Mr. *Clarke*, (meaning the plaintiff,) had been introduced to him by a very respectable party; that he had sold stock for *Clarke*, amounting to 1700*l.*, and had introduced him to Messrs. *Jones, Lloyd, & Co.*, with whom he had opened an account by depositing 2000*l.* We believe there is not the slightest reason to doubt the truth of Mr. *Peacock's* statement; and the probability is, that *Clarke*, (meaning the plaintiff,) had been furnished with the stock, and an introduction had been obtained to the stockbroker for the purpose of giving colour to his, (meaning the plaintiff's,) proceedings here and in *Yorkshire*. By means of the committing of which said several grievances, by the defendants as aforesaid, the plaintiff was greatly injured in his said good name, fame, and credit, and in his said trade and business; and thereby, also, one *Richard Musgrove*, who otherwise would have entered into the plaintiff's employ in his said trade and business, then refused so to do, and the plaintiff was compelled to pay a large sum, to wit &c., in order to rescind a certain contract by him then made in that behalf with the said *Richard Musgrove*.

The defendants pleaded, first, not guilty. Second—A justification of the libel, except the two following passages:—"As we have already stated, *Clarke* had been at *Leeds* for one or two days before his arrival in this town, and is supposed to have made considerable purchases there. It is hoped, however, that the detection of his plans in *Manchester* will be learnt in time to prevent any very serious losses from taking place."—"We have already stated, that *Clarke* referred Mr. *Norris* to a stockbroker in *London*, a Mr. *Peacock*, we believe, to whom Mr. *Norris* wrote for information respecting *Clarke's* cir-

cumstances. He received a reply from Mr. *Peacock*, stating that Mr. *Clarke* had been introduced to him by a very respectable party; that he had sold stock for *Clarke*, amounting to 1700*l.*, and had introduced him to Messrs. *Jones, Lloyd, & Co.*, with whom he had opened an account by depositing 2000*l.* We believe there is not the slightest reason to doubt the truth of Mr. *Peacock's* statement; and the probability is, that *Clarke* had been furnished with the stock, and an introduction had been obtained to the stockbroker, for the purpose of giving colour to his proceedings here and in *Yorkshire*."

At the trial, before *Tindal, C. J.*, at the *London* sittings after *Trinity Term*, the defendant proved the justification, and the jury found a verdict for the defendant on both issues.

Humfrey, in pursuance of leave reserved at the trial, obtained a rule *nisi* to enter the judgment for the plaintiff, for nominal damages of one farthing, on those parts of the libel which the plea did not justify. These damages had been assessed under the direction of the learned judge, to avoid the necessity of a new trial.

Wightman and *W. H. Watson* shewed cause.—The plea does in effect justify the whole of the libel. It does not justify every particular statement, nor is it necessary that it should do so, for the transactions at *Leeds* and in *Yorkshire* are drawn into the question, whether a grand swindling transaction was not going on at *Manchester*. The charge of swindling at *Manchester* was justified, and the jury have found that the justification was proved, and no swindling is alleged in any place except *Manchester*. In *Clarkson v. Lawson* (a), the defendant published, that the plaintiff, a proctor, had been suspended three times, and a plea that he had been suspended once was held to be insufficient; but that case differs from the present, because there the particular statement was the substance of the libel, and *Tindal, C. J.*, observed, "I cannot but think that if a party be believed to have committed three distinct offences, his character is much more deeply affected than if he has only been charged with the commission of one." Here the substance of the libel was the grand swindling transaction at *Manchester*, which was justified. [*Bosanquet, J.*—I tried a case on the circuit, where the libel consisted of a charge that the plaintiff had stolen five sheep, and the defendant having justified as to the stealing of only three sheep, I held it to be insufficient.] That case is analogous to that which has been cited. *Weaver v. Lloyd* (b) and *Mountney v. Watton* (c), are both distinguishable, because the gist of the libel was unanswered. In *Edwards v. Bell* (d), *Burrough, J.*, says, "The defendants were entitled to justify in this action, by shewing that what they had alleged against the plaintiff in that respect was borne out in fact. In such a case it is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment." *Woolnoth v. Meadows* (e) is to the same effect. In *J'Anson v. Stuart* (f) and *Newman v. Bailey*, there cited, which are two of the earliest authorities upon this point, the objection to the pleas of justification was, that they were too general; but here the justification goes into a detail of the circumstances, so that the plaintiff cannot say that he was taken by surprise.

The statement of the transactions, at *Leeds* and in *Yorkshire*, if taken *per se*,

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(a) 6 Bing. 266.
(b) 2 B. & Cress. 678.
(c) 2 B. & Adol. 673.

(d) 1 Bing. 409.
(e) 5 East. 463.
(f) 1 T. R. 748.

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does not constitute a libel; for the acts which are alleged to have been done there, are connected with and give colour to the grand swindling transaction at *Manchester*, which is justified. The plaintiff might have been innocently at *Leeds*, and the declaration does not state, by innuendo, that the statement intended to impute any fraudulent design to the plaintiff during his stay there. Therefore the pleas cover the whole of the libellous part of the statement.

Platt and Humfrey, contra.—The cases which have been cited are sufficient to establish that a justification must cover the whole of the libel, or it is insufficient. The case is therefore narrowed to a single point, namely, whether the part of the statement which is not justified amounts to a libel. The statement imputes fraud to the plaintiff, at *Leeds* and in *Yorkshire*. The cases which have been cited on the other side, establish that if several acts of fraud are imputed, they must all be justified. The plaintiff is therefore entitled to have this rule made absolute.

TINDAL, C. J.—There can be no doubt but that a defendant may justify only a part of a libel; that is well established by the case of *Styles v. Nokes* (g); but if the defendant justifies a part only, and leaves another part not justified, which contains libellous matter, then he is liable in damages for the part which the justification does not cover. In the present case, the plea does not affect to justify the whole of the statement which was published; and the question is, whether we can see that the part which is not justified, contains a substantive ground of action for which damages may be given. Upon looking at the whole of this publication, I cannot see, with certainty, that the part which is not justified would of itself furnish a good ground of action. The general charge is, that the plaintiff was concerned in a grand swindling transaction, and no person can read the statement, without seeing that the place intended to be referred to as the scene of the transaction, is primarily and substantially *Manchester* alone. The newspaper which contains the paragraph is published in that town, and it commences by calling attention to something which has happened there. It speaks of the arrival of the plaintiff at the *Mosley Arms* inn, and that he arrived there for the purpose of buying goods in *Manchester*, and in other parts of the statement, the writer points out *Manchester* as the principal arena of the transaction. But it is contended that, at the end of the paragraph, it is alleged, that fraud has been practised at *Leeds*, as well as at *Manchester*: and it is said, that inasmuch as the justification does not extend to *Leeds*, the plaintiff is entitled to damages for that part of the publication, for which the jury have assessed the damages at one farthing. The part of the statement which relates to *Leeds*, is as follows: "As we have already stated, *Clarke* had been at *Leeds* for one or two days before his arrival in this town, and is supposed to have made considerable purchases there; it is hoped, however, that the detection of his plans at *Manchester* will be learnt in time to prevent any very serious losses taking place." The writer meant, no doubt, to insinuate that the plaintiff had not been at *Leeds* for any good purpose; but the declaration does not contain any allegation that these words implied that the plaintiff had been guilty of fraudulent practices at *Leeds*; the statement is left in ambiguity, and as the plaintiff does not raise any libellous inference from it, why should we do so? The only remaining part of the statement

which is not justified, relates to the introduction of the plaintiff to the stockbroker. This portion of the paragraph has a tendency the same way, but I do not see why we should be called upon to give it a libellous meaning, when the plaintiff might himself have called our attention to it, if he had considered that it was libellous. The rule must therefore be discharged.

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PARK, J.—I am of the same opinion. Upon seeing the whole of the paragraph, I admit the statement as to the occurrences at *Leeds*, comes very close to a libel; but, taken by itself, it is impossible to say that it is libellous. If it is read by itself, the general effect of it is, that the plaintiff had been at *Leeds* making purchases there: and it is only by endeavouring to connect it with the proceedings at *Manchester*, that any libellous tendency appears. If the passage is read by itself, it does not amount to a libel.

VAUGHAN, J.—The counsel agree on the law applicable to this case, namely, that a justification ought to cover the whole of the libel. The only question is, whether the whole of this libel is not substantially justified, or whether there is a distinct imputation of criminality which is not justified. It is contended that the statement of the occurrence at *Leeds* imputes a distinct fraud to the plaintiff, and that, as in *Clarkson v. Lawson* (*h*), where three substantive offences were imputed, a justification of one only was held to be insufficient. But the declaration does not contain any innuendo to point out the libellous application of the statement respecting *Leeds*; and I cannot see with sufficient clearness and distinctness that it is a libel, when read by itself, to be enabled to say that the plaintiff is entitled to recover the nominal damages which the jury have assessed.

BOSANQUET, J.—The plaintiff's counsel admit that the true way of considering the question is, to consider whether that portion of the statement which the justification does not cover, is of itself a libel. If we examine the statement made as to *Leeds*, the first part of it is, that the plaintiff's funds were first transmitted to *Leeds*, where he was supposed to have made considerable purchases; that contains no charge of fraud. Then follows, "it is hoped, however, that the detection of his plans at *Manchester* will be learnt in time to prevent any very serious losses from taking place;" but here there is nothing which necessarily imputes criminality to the plaintiff. The last part relates to the introduction of the plaintiff to the stockbroker, and I have doubted most upon this portion of the statement; it is said, "The probability is that *Clarke* had been furnished with the stock, and an introduction had been obtained to the stockbroker for the purpose of giving colour to his proceedings here, and in *Yorkshire*." No doubt the words "giving colour," are ambiguous; but at the same time they do not necessarily impute fraudulent conduct to the plaintiff.

I am therefore of opinion, that this is a justification of all the material matter contained in the libel; and it is not to be forgotten that, on the plea of not guilty, the question was left to the jury at the trial.

Rule discharged.

(*h*) 6 Bing. 268.

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April 19th.

A bailiff and his son were watching at the house of a debtor, one at the back door, and the other at the front, to arrest him under a *ca. sa.*, and the debtor having left the house by the back door, the son immediately followed him, without giving notice to his father, and took him into custody, and by representing to a police officer that the debtor had committed a felony, he was taken to the police-station; the bailiff who had the warrant in his possession, afterwards came to the police station, and conveyed the debtor to the sheriff's prison; held, that the arrest was illegal.

Whether the original arrest, by the son, would have been lawful, if he had not charged the debtor with felony, *quære*.

DEBT on a bond, given by the defendant to the sheriffs of *London*, as the surety of *William Jackson*, one of the serjeants-at-mace of the said sheriffs, for the faithful discharge of the duties of his office, The defendant pleaded general performance of the conditions contained in the bond.

Replication.—That on, &c. certain persons, to wit, R. S. and G. D. sued and prosecuted out of the court of our lord the king of the bench, a certain writ of our lord the king, called a *capias ad satisfaciendum*, directed to the sheriffs of *London*, by which said writ our said lord the king commanded the said sheriffs that they should take one *G. Price*, if he should be found in their bailiwick, and him safely keep, so that they might have his body before his majesty's justices of the bench at *Westminster*, on, &c., to satisfy the said R. S. and G. D., as well of a certain debt of 200*l.* which the said R. S. and G. D. had recovered against him in the said court before the justices at *Westminster*, as also for 70*s.*, &c., whereof the said G. P. was convicted, as appeared to the said justices of record; and that the said sheriffs should have there that writ, and which said writ afterwards, and before the return thereof, to wit, on, &c. was delivered to the said plaintiffs, they then being sheriffs of *London*, to be executed in due form of law. And the said plaintiffs further say, that afterwards, and before the return of the said writ, to wit, on, &c. they being such sheriffs of *London* as aforesaid, for having execution of the said writ, made their warrant in writing, and directed the same to the said *William Jackson*, in the course of his said office, he then being such serjeant-at-mace of them the said plaintiffs as aforesaid; and by the said warrant commanded him that he should take the said G. P. to satisfy the said R. S. and G. D. the said 200*l.* debt, and also the 70*s.* damages, which they had sustained according to the tenor of the said writ. And the said plaintiffs further say, that the said *William Jackson* afterwards, to wit, on, &c. took upon himself the execution of the said warrant, and acting in his said office of serjeant-at-mace of the said plaintiffs as aforesaid, and under colour of the said warrant, illegally seized and imprisoned the said G. P., he the said G. P. then, and at the time of said seizure being illegally imprisoned by one *Richard Jackson*, who acted in aid of the said *William Jackson* on the said occasion, and who had previously seized and imprisoned the said G. P. without any sufficient authority in that behalf, and of which illegal imprisonment the said *William Jackson* knowingly availed himself. And the said plaintiffs further say, that the said *William Jackson* having so illegally seized and imprisoned the said G. P. as aforesaid, he afterwards, to wit, on the day and year last aforesaid, conveyed the said G. P. to a certain prison, to wit, *Whitecross Street Prison*, being a prison of the said plaintiffs as such sheriffs of *London*, and then delivered him to the said sheriffs, who detained him in custody there, under the supposed authority of the said writ of *capias ad satisfaciendum*, they the said plaintiffs being wholly ignorant and without notice of the illegal manner in which he had been seized and imprisoned by the said *William Jackson* as aforesaid. And the said plaintiffs further say, that afterwards, to wit, on, &c. the said G. P., in an action brought

by him in the said court of our lord the king of the bench, impleaded the said plaintiffs, and the said *William Jackson* and *Richard Jackson*, for and in respect of the said illegal seizure and imprisonment of him the said G. P. as aforesaid, and such proceedings were thereupon had, that they the said plaintiffs, in order to relieve themselves from the said action, and to settle the same, necessarily and properly, and for the benefit and advantage, as well of the said defendant and the said other persons, parties to the said writing obligatory, as of themselves, paid to the said G. P. a certain large sum of money, to wit, the sum of 80*l.*, for his damages, by reason of the said illegal seizure and imprisonment, and his costs in the said action, and the said plaintiffs were also compelled and necessarily became liable to pay a certain other large sum of money, to wit, the sum of other 80*l.* for their costs, in and about defending and settling and putting an end to the said action, of all which premises the said defendant had notice, &c., and were requested, &c.

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Rejoinder.—That the said *William Jackson* did not illegally seize or imprison the said G. P. in manner and form as the plaintiffs had in their said replication in that behalf alleged; and thereupon issue was joined.

At the trial of the cause before *Tindal*, C. J., at the *London* sittings after *Hilary* Term, it was in evidence that *William Jackson* had received a warrant from the sheriffs, requiring him to arrest the debtor under a writ of *ca. sa.*

William Jackson, accompanied by his son *Richard*, proceeded to the debtor's residence in the *Temple*, for the purpose of executing the warrant, and *Richard Jackson* watched at the back door, whilst *William*, who had the warrant, remained near the front door of the house. *Richard Jackson* having seen the debtor leave the house by the back door, at a quick pace, immediately followed him into the *Strand*, and there arrested him. The debtor asked to see the warrant, which authorised the capture, and a crowd of persons having assembled, *Richard Jackson* appealed to a policeman, who was present, and required his aid to capture the debtor on a charge of felony. The debtor was then conveyed by *R. Jackson* and the policeman, to the police station, and a memorandum was entered on the books, charging the debtor with having made his escape from civil process. *William Jackson* having in the mean time arrived at the station house, he slipped the warrant into his son's hand, and the debtor was conveyed to *Whitecross Street Prison*, under the warrant, where he remained until he was discharged by the order of a judge. The debtor afterwards brought an action against the sheriffs and the two *Jacksons*, for making an illegal arrest, and recovered damages. A new trial was afterwards ordered, when the action was compromised, in the manner stated in the replication (a). These facts having been proved, the jury found a verdict for the plaintiffs, damages 160*l.*

Atcherley, Serjt., moved for a new trial.—The issue raised by the pleadings is, whether *William Jackson* did illegally seize and imprison the debtor. Now this was not an illegal imprisonment by *William Jackson*. It is sufficient if an arrest be made by the authority of the bailiff, but he need not be the hand that arrests, nor need he be in the presence of the person arrested, nor actually in sight. *Wilson v. Gary* (b), *Blatch v. Aroher* (c).

(a) See *Barratt v. Price*, 9 Bing. 566, and *Price v. Peek*, 1 Bing. N. C. 380.

(c) Cowper, 63; S. C. *nomine*; *Fenton's case*, 11*ast*, 524.

(b) 6 Mod. 211.

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The son had a right to follow the debtor when he saw him leave his house; and it is clear that on an action for an escape, the act of the son would have been treated as the act of the father. [*Bosanquet, J.*—Here the son seems to have repudiated the authority of his father.] The charge of felony did not determine the authority of the warrant; if it were so, any false statement made by the officer, or any stratagem which he might practise, would render the arrest unlawful. The officer might have exceeded his authority, or he might have used unnecessary harshness in executing the warrant, but the mode of detaining a debtor does not alter the right to detain. Here the debtor was in custody under a legal warrant; and it does not appear that the father was acquainted with the mode in which the capture was originally made.

TINDAL, C. J.—The only point before us is, whether the issue joined between the parties, which the jury have found in favour of the plaintiffs, is made out by the evidence. The precise issue is, whether *William Jackson* did illegally seize or imprison the debtor. The first part of the evidence which affects *William Jackson* is, that he came to the station house, where he found the debtor in custody, on a charge entered against him on the book. The question then is, whether, at the time when *William Jackson* put his warrant in force, the debtor was in legal custody or not. It has been contended that *Richard Jackson* had the legal custody of the person of the debtor, by following him immediately after he had left his house. That may be so, but it is immaterial to decide that point, for if *Richard Jackson* had a right to make the capture, he parted with and determined the custody by his own act. If the son had called upon the police officer to assist him in making the caption, through the want of strength to effect it by himself, the arrest might have been lawful; but instead of that being the case, the police officer is called upon by *Richard Jackson*, to assist in capturing the debtor on a charge of felony, which he knew at the time was false. That was in effect giving up the legal custody, which he might perhaps have had, and the detention became illegal. The debtor was first charged with felony, but, at the station house, *Richard Jackson* stated that the caption was made under an escape warrant. Such a warrant could only be issued under the stat. 1 Ann. s. 2, c. 6, and is directed to all sheriffs, mayors, and constables, and authorizes them to seize the person who has escaped, and to commit him to the common gaol.

The debtor was therefore in illegal custody, when *William Jackson* came to the police station, and the question is, whether he knew that his son had acted illegally in making the caption, for he certainly might have supposed that the police were called upon to interfere, under circumstances which rendered their interference lawful. But that was a question which was submitted to the jury, and there was no reason to doubt but that the father was aware of the circumstance. He gave the warrant to his son, after he knew that the debtor was at the station house on a criminal charge, and that the arrest had been made without a warrant.

It was therefore sufficiently proved that the debtor was illegally imprisoned by *Richard Jackson*, and when the sheriff is cognizant of such an illegality, and avails himself of it, the arrest is illegal (*d*).

(*d*) This point was determined in *Barratt v. Price*, 9 Bing. 568.

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it state any matter of law or of fact in avoidance of any or of any part of the causes of action in the declaration alleged—that it contained material allegations, inconsistent with each other, inasmuch as it contained averments, shewing that the sum of 173*l.* 5*s.*, therein mentioned, was paid by the plaintiffs for certain premiums of insurance and expenses paid in consequence of the retainer of the defendants, and yet attempted to tender for issue certain facts, from which it was sought to be inferred that the same payments and expenses were made in the plaintiffs' own wrong, and without any request or retainer from the defendants—that, by the said plea, it was admitted that there was an account stated between the plaintiffs and defendants, as in the declaration alleged; and it was also implied and admitted that the said sum of 173*l.* 5*s.* was an item in such account, and that a balance to that amount remained to the credit of the plaintiffs; and yet there was not shewn any matter in avoidance of or as a set-off against the said sum of 173*l.* 5*s.*; but, in a subsequent part of the plea, it was attempted to be shewn that the said sum never was a valid debt, in account or otherwise; and it was stated in effect, notwithstanding the implied admission of the said account, and of the said sum, being such balance as aforesaid, that the said sum consisted of certain payments made by the plaintiffs in their own wrong; and not at the request of the defendants, and for which said sum it was attempted in and by the said plea (but in an argumentative, indirect, and insufficient manner,) to be shewn, that the defendants never were or ought to be liable to the plaintiffs; and that the said plea contained various allegations, upon no one of which could the plaintiffs take issue, without thereby admitting the truth of the other allegations in the plea, which, though wholly false or unfounded, would materially embarrass the plaintiffs, on the trial of the cause, in the recovery of their demand.

Joinder in demurrer.

J. Manning, in support of the demurrer.—This plea amounts to the general issue, non-assumpsit; and it does not come within the excepted cases, when, before the new rules, it might have been pleaded specially notwithstanding it did amount to the general issue. *Carr v. Hinckliff* (a); *Maggs v. Ames* (b). The new rule is, that the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. Therefore the law now remains as it was before; and it is clear that the defence set out in the second plea could have been given under non-assumpsit. [*Tindal, C. J.*—But why do the plaintiffs complain? The plea gives them notice of the defence which is intended to be set up; and, by replying *de injuriâ*, the whole of the matters alleged in the plea would be denied.] When this plea was pleaded, it was very doubtful whether a replication of *de injuriâ* was applicable to the case (c), and the defendants would have been embarrassed by admissions if they had taken issue on only one of the allegations. [*Tindal, C. J.*—I do not see why the defendants could not plead this matter specially. The demurrer had better be withdrawn, and the plaintiff may amend by pleading *de injuriâ*.] Then, inasmuch as the defendants well knew that this defence might have been given under the plea of non-assumpsit, they ought to

(a) 4 B. & Cress. 547.

(b) 4 Bing. 470.

(c) *Vide Whittaker v. Ma* n, 1 Hodges, 319; *Griffin v. Yates*, 1 Hodges, 307.

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at the plaintiffs' request, retained and employed the plaintiffs as insurance brokers and agents in that behalf, for compensation and reward to them in that behalf, to effect and cause to be made for the benefit of the defendants as insurance to the amount of a certain sum of money, to wit, &c. upon the said goods in the said ship, upon and for the said voyage from *Falmouth* to *Oporto*, which said retainer and employment the plaintiffs then accepted, and, in consideration of the premises, then promised the defendants to do and perform their duty as such brokers and agents as aforesaid in that behalf; and thereupon it then became and was the duty of the plaintiffs, as such brokers and agents of the defendants as aforesaid, to use due and proper care and skill in and about the effecting and causing to be made such insurance as aforesaid; that the plaintiffs, well knowing the premises, and that the said goods had been shipped and loaded at *London* as aforesaid, and not at *Falmouth* as aforesaid, but neglecting their duty in that behalf, did not nor would use due or proper skill in and about the effecting and causing to be made the same insurance, but wholly neglected so to do; and, on the contrary thereof, as and for the purpose of effecting such insurance as aforesaid, carelessly, negligently, unskilfully, and improperly effected and caused to be made two policies of assurance, to wit, &c. which policies, by reason of the carelessness, negligence, and want of skill of the plaintiffs in that behalf, were worded and expressed in such words and manner as not to be, and the same were not, nor was either of them, applicable or adapted to an insurance upon the said goods or any goods shipped and loaded in and on board of the said ship at *London* aforesaid; by means whereof the said policies of assurance did not, nor did either of them, operate and were not, nor was either of them, an insurance upon the said goods or upon any part thereof, and thereby the defendants were prevented from having, and never had, any insurance on the said goods or any part thereof, or any indemnity, benefit, or advantage whatever, of or from the said policies of assurance, and the said goods, by means of the premises, and of the carelessness, negligence, and want of skill and improper conduct of the plaintiffs, as such insurance brokers and agents of the defendants in that behalf as aforesaid, were wholly uninsured of or for the said voyage from *Falmouth* to *Oporto*, and that the said sum of 173*l.* 5*s.* was and is the amount of certain premium of insurance and expenses upon, of, and relating to the said policies of assurance, and paid and incurred by the plaintiffs in and about and relative to the same, and the effecting and causing the same to be made. Conclusion with a verification.

Replication—To the first plea, *similiter*; to the second plea, a special demurrer.

The causes of demurrer were, that the defendants specially pleaded a matter amounting in effect to a general traverse of the promise laid in the declaration as far as such promise related to the causes of action in the commencement of the plea referred to—that the plea was a multifarious, argumentative, and insufficient mode of pleading non-assumpsit to the last-mentioned causes of action—that the plea concluded with a verification, and purported to be a special plea in avoidance of the last-mentioned causes of action, without in any manner confessing even a *prima facie* or colourable title in the plaintiffs—that the plea did not state any fact which arose after the causes of action which it professed to answer, had accrued to the plaintiffs; nor did it contain any matter of law in answer to the last-mentioned causes of action; nor did

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it state any matter of law or of fact in avoidance of any or of any part of the causes of action in the declaration alleged—that it contained material allegations, inconsistent with each other, inasmuch as it contained averments, shewing that the sum of 173*l.* 5*s.*, therein mentioned, was paid by the plaintiffs for certain premiums of insurance and expenses paid in consequence of the retainer of the defendants, and yet attempted to tender for issue certain facts, from which it was sought to be inferred that the same payments and expenses were made in the plaintiffs' own wrong, and without any request or retainer from the defendants—that, by the said plea, it was admitted that there was an account stated between the plaintiffs and defendants, as in the declaration alleged; and it was also implied and admitted that the said sum of 173*l.* 5*s.* was an item in such account, and that a balance to that amount remained to the credit of the plaintiffs; and yet there was not shewn any matter in avoidance of or as a set-off against the said sum of 173*l.* 5*s.*; but, in a subsequent part of the plea, it was attempted to be shewn that the said sum never was a valid debt, in account or otherwise; and it was stated in effect, notwithstanding the implied admission of the said account, and of the said sum, being such balance as aforesaid, that the said sum consisted of certain payments made by the plaintiffs in their own wrong; and not at the request of the defendants, and for which said sum it was attempted in and by the said plea (but in an argumentative, indirect, and insufficient manner,) to be shewn, that the defendants never were or ought to be liable to the plaintiffs; and that the said plea contained various allegations, upon no one of which could the plaintiffs take issue, without thereby admitting the truth of the other allegations in the plea, which, though wholly false or unfounded, would materially embarrass the plaintiffs, on the trial of the cause, in the recovery of their demand.

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(a) 4 B. & Cress. 547.

(b) 4 Bing. 470.

(c) *Vide Whittaker v. Ma* n, 1 Hodges, 319; *Griffin v. Yates*, 1 Hodges, 357.

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pay the costs of the amendment. [*Bosanquet, J.*—The new rule is, that all matters which shew the contract to be void or voidable, in point of law, must be specially pleaded.] Here the plea admits that an account was stated between the parties, and that 173*l.* 5*s.* was then found to be due.

Barstow.—The plea is good. The object of the new rules is to compel the defendant to plead his defence specially, that the plaintiff may not be surprised at the trial. Before the new rules this plea would have been good; it clearly comes within the rule laid down in *Maggs v. Ames (d)*. There it is said, "One species of cases in which this may be done, is where the plaintiff's right of action, (which is confessed,) is avoided by matter *ex post facto*; or by payment, which may be given in evidence, under the general issue as pleaded." But since the new rules, the defendants were compelled to plead this defence specially, because it comes within the rule mentioned by Mr. J. *Bosanquet*, for the transaction was rendered *voidable* by reason of the plaintiffs' negligence. If upon the trial the defendants had offered to admit that the money was paid, but that, in consequence of the gross negligence of the plaintiffs, they had received no benefit from the payment, it would have been objected that such a defence ought to have been specially pleaded. As to the admission on the account stated, the identity of the money appears in a subsequent part of the plea.

TINDAL, C. J.—Suppose the parties had met together, and, with a full knowledge of the facts, had stated an account between them. For any thing which appears, the defendants may not have sustained any loss.

The argument was not continued, as the counsel on both sides agreed to amend, without payment of costs on either side.

(*d*) 4 Bing. 473.

WELLS and another v. PORTER.

April 20th.

In assumpsit for work and labour, and money paid, at the defendant's request, the plea was, that the work, &c. was done in making a contract between the defendant and other persons, for liberty to the defendant to accept or refuse certain public stocks of Spain and Portugal, the plaintiff well knowing that the defendant and the said other persons were not possessed of or entitled to the same. *Held*, first, that this contract was not illegal under the Stock-Jobbing Act. 7 G. 2. c. 8, that statute being only applicable to jobbing in the *English* funds; and, secondly, that the contract between the plaintiff and defendant was not illegal at common law.

ASSUMPSIT to recover 1500*l.* for work and labour, money paid, and money due upon an account stated.

Pleas, as to 1183*l.*, parcel of the sum of 1500*l.*, that the said work so alleged to have been done by the plaintiffs, was work done by the plaintiffs as brokers and agents in and about the making of divers contracts between the defendant and divers other persons, for liberty to the defendant to put upon, and to deliver and receive, accept or refuse, certain public stocks of certain foreign states; that is to say, of the kingdom of *Spain* and *Portugal* respectively; and certain parts, shares, and interest therein, the defendant, and the other persons parties to the contracts respectively, not being possessed of or entitled to the same, or any part thereof, either in their own right or in their own names, or in the name or names of a trustee or trustees to their own use; and the plaintiffs, at the time of paying the said monies, well knowing

that the defendant and the said other persons, parties to the contract respectively, were not possessed of or entitled to the same or any part thereof, either in their own name or in their own right, or in the name or names of a trustee or trustees to their use or in their right.

Second plea—That the said work, so alleged to have been done by the plaintiffs, was work done by them as brokers and agents, in unlawfully negotiating, transacting, and intermeddling in the making, and procuring to be made, certain contracts and agreements for buying, selling, assigning, and transferring certain public stocks of certain foreign states; to wit, of the kingdom of *Spain* and *Portugal* respectively; and certain parts, shares, and interest therein, which the defendant and the other persons contracting, and on whose behalf the said several contracts and agreements were made, to sell, assign, and transfer the same, were not, nor was any of them at the time of the making of such contracts and agreements respectively, actually possessed of or entitled to, either in their own right or in their own names, or in the name or names of a trustee or trustees, or any other person or persons, to their use or in their right; the plaintiffs at the time of the doing of the said work, and of the making of the said contracts and agreements, well knowing that the persons on whose behalf such contracts and agreements were respectively made, were not, nor was any of them, possessed of or entitled to the said stocks, parts, shares, or interests, in respect of which such contracts and agreements were respectively made, in his, her, or their own name or names, or in the name or names of a trustee or trustees, or any other person or persons, for their use or in their right.

Demurrer.—The causes assigned were, that the said pleas did not deny, or confess and avoid the part of the declaration to which they were pleaded; that there was nothing in the said pleas, or either of them, to shew that the contracts therein alleged were illegal or void, by reason of any statute or otherwise, or without consideration; and also that the said pleas were respectively double, and contained a twofold answer, to so much of the declaration as they professed to answer; in this, to wit, that the defendant had, in each of the said pleas, pleaded and alleged that the said supposed contracts in the pleas respectively mentioned were in the nature of putts and refusals, and also that the respective parties thereto were not, at the time of making the same, in any way possessed of or entitled to the said stock, in respect whereof the said supposed contracts were made.

Butt, in support of the demurrer.—I. The 7 G. 2, c. 8, is a penal statute, and the Court will not enlarge it by implication beyond its obvious and natural meaning. It was passed for the purpose of remedying the mischiefs occasioned by stock-jobbing; and the preamble recites that great inconvenience had arisen, and did daily arise, by that destructive practice: therefore the object of the statute was to stop a practice which was well known at the time; the provisions of it could only have been intended to apply to transactions in the *English* funds, for at that time foreign stocks were almost, if not entirely, unknown in this country. In *Henderson v. Bise* (e), Lord *Tenterden*, C. J., held, that the words "public or joint-stock," used in sec. 10. of the statute, related merely to stock of this country, and that the statute was passed to prevent jobbing in the *British* public funds; and it does not appear that this decision

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was ever questioned, as no further report of the case is to be found in the books. And in *Mortimer v. Salkeld* (*f*), it was held that lottery-tickets were not public securities within the meaning of the statute.

II. It may be said that this contract between the plaintiffs and defendant is illegal at common law: but that is not so, for if the contract made on behalf of the defendant should be illegal, it does not therefore follow that the plaintiffs are not entitled to recover compensation against the defendant, in this action, for his work and labour. It is like an illegal race, which may take place on a course; and yet a third party, who puts up the stakes, rails, &c. to prepare the race-course, would be entitled to recover for work and labour against the person who employed him.

J. Manning, contrà.—I. This contract is within the Stock-Jobbing Act. The stocks of *Holland* and *France* were well known in this country when the statute was passed. [*Tindal*, C. J.—I do not know that we can take notice of that circumstance; *de non apparentibus et non existentibus eadem est ratio*.] The statute applies to “any public or joint-stock,” and if that does not include foreign stock, the following words, “or any other public securities whatsoever,” do clearly include foreign securities. The preamble recites, that “great inconveniences had arisen through the destructive practice of stock-jobbing,” which would arise from transactions in foreign as well as in English funds; and the statute must have been intended as an effectual and not as a partial remedy. The opinion of Lord *Tenterden*, in *Henderson v. Bise* (*g*), was wholly extra-judicial, because it did not appear what the nature of *Colombian* bonds was: and the objection arose on the 7th sec. of the statute, which makes it lawful, but does not require, a purchaser to whom stock ought to have been delivered, to purchase other stock, and then bring an action to recover the difference. *Mortimer v. Salkeld* (*f*) is quite beside the question, as that was the case of a lottery, which has nothing whatever to do with public securities. *Rossum v. Taylor* (*i*) was a case tried before *Dallas*, C. J., in 1823, in which the plaintiff sued for differences upon dealings in *Spanish* stock: the learned judge said the question ought to undergo the consideration of a full court. Several other objections were taken, but the plaintiff had a verdict, with leave to the defendant to move to enter a nonsuit, which was accordingly done in the following term. In granting the rule *nisi*, Lord C. J. *Dallas* said, “This is a case of stock-jobbing in the foreign funds, and not in our own; in his present opinion, it was not the less gambling because it was in this or that stock; however, Sir *John Bernard*’s act was nominally applicable to the *British* funds only. But what was the title of that act? It was ‘An Act to prevent the infamous Practice of Gambling in Stock-Jobbing;’ the legislature, therefore, had pronounced the act infamous. The question, therefore, upon that point was still open.” That case is therefore a strong authority in favour of the defendant.

II. But the contract is illegal at common law. In *Bryan v. Lewis* (*j*), it is said that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, he

(*f*) 4 Camp. N. P. C. 42.

(*g*) 3 Stark. N. P. C. 158.

(*i*) Cited in Chitty’s Statutes, 1032, note (*h*).

(*j*) Ryan & Moody, N. P. C. 386.

cannot maintain an action for damages for non-performance of the contract : and Lord *Tenterden*, C. J., said, " I am clearly of opinion that this action cannot be maintained : I have always thought, and shall continue to think, until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract. Such a contract amounts, on the part of the vender, to a wager on the price of the commodity, and is attended with the most mischievous consequences." The same learned judge intimated a similar opinion in a subsequent case, reported in *Chitty on Contracts* (k). In *Clayton v. Dilly* (l), it was held, that one who, by the defendant's authority, lays illegal bets in the defendant's name, and, losing, pays them without a subsequent direction to do so, could not recover the amount from the defendant ; and here the plea alleges that the work done by the plaintiffs was in negotiating illegal contracts. *Josephs v. Pebrer* (m).

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Butt, in reply.—I. The case of *Clayton v. Dilly* (l) is distinguishable, because here the declaration alleges that the work was done, and the money paid, at the defendant's request. That the object of the statute was directed towards jobbing in the *English* funds, appears by the 10th sec., where it is enacted, " that nothing in the act contained should extend to any contract or agreement, for the purchase or sale of any stock, annuities, or other public securities, to be made with the privy of the accountant-general of the Court of Chancery : " and it is clear that the transactions of the accountant-general would not extend to any foreign funds : therefore, the words " public securities " must mean such as were of this kingdom. The opinion expressed by Lord *Tenterden*, in *Henderson v. Bise* (o), was clear and precise. He observed, " It did not appear what the nature of *Colombian* bonds was : it was probable that the trafficking in such instruments might be attended with as much mischief as jobbing in the funds of this country ; and it might be desirable that a statute should be passed to restrain such practices ; but as they did not fall within the statute referred to, the plaintiff was entitled to recover." Therefore, that learned judge considered that the preamble ought not to enlarge the meaning of the act, for the trafficking in *Colombian* bonds was within the mischief of stock-jobbing. The preamble of a statute may sometimes be looked at for the purpose of construing the subsequent enactments, but never for the purpose of enlarging them.

II. *Bryan v. Lewis* (p), if it should now be recognized, was a very different case from the present ; for here the action is brought by a third party, who effected the contract at the request of the defendant ; and it is difficult to see why the work and labour of the plaintiffs is illegal. And if the defendant had intended to take the objection, that the contract was void at common law, the plea ought to have averred that there was no reasonable expectation of obtaining the stock when the bargain was made. If, therefore, the case is not within the statute, then upon the other point the plea is insufficient.

(k) 2nd ed. 332.

(l) 4 Taunt. 165.

(m) 3 B. & Cress. 639.

(o) 3 Stark. N. P. C. 159.

(p) Ryan & Moody, N. P. C. 386.

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TINDAL, C. J.—It appears to me that the pleas do not furnish any answer to this action. It is brought for work and labour, and money paid; and the defence set up by the pleas is, that the work was done and the money paid by the plaintiffs as brokers, in making contracts between the defendant and other persons, respecting certain public stocks of certain foreign states, the plaintiffs knowing that the defendant and the other parties to the contract were not possessed of the same. In effect, the pleas are drawn on stat. 7 G. 2, c. 8. and they afford an answer to the action, provided foreign stocks fall within the provisions of that statute.

It appears to me that stocks, not of this kingdom, are not within the words or the meaning of that statute.

It is clear that it was passed to prevent practices which were then found to be injurious and pernicious. The title and preamble of the statute shew, that its general object was to put down the common practice of stock-jobbing. Several acts had previously passed which related to the mode of transferring stocks of this realm, and they shew the subject-matter upon which this statute might operate. If it operated on foreign securities, the fact that such foreign securities existed when the act passed, ought to have been shewn; but as that has not been done, we must consider this question as if no other stock was then in existence, and, upon that ground alone, it seems to me that the plaintiffs are entitled to our judgment.

But, further, it is to be remarked that this statute carries with it very severe consequences; one of them is, that after a party has become liable to a penalty, he may be put on his oath touching the offence; and such a statute ought not to be enlarged beyond its fair and natural meaning, nor ought it to be extended by any intendment which might be engrafted upon it.

Upon looking at the *tenth* section, which enacts that the provisions of the statute shall not extend to any contract relating to stock or other public securities, made by the accountant-general, it is clear that the stock which is there meant, is stock of this kingdom; for it is well known that the accountant-general never purchases any other description of stock: and although that does not conclusively establish that the statute does not generally apply to other kinds of stocks, yet it affords an inference to shew what was in the contemplation of the legislature. As far, therefore, as the statute is concerned, I am of opinion that this case is not within its provisions.

Then it is objected that these contracts are illegal at common law, and that work and labour, bestowed in carrying them into effect, would also be illegal. In the first place, it has not been very distinctly shewn that these wagers were illegal at common law; for it is to be observed, that the words of the statute are words of enactment, and are not declaratory; and the statute does not seem to recognize the dealing in stock as being then an offence. The most that could be said is, that the contracts are void; and as the work and labour is one degree further removed, I cannot see my way with sufficient clearness to say that it is illegal at common law. Our judgment must, therefore, be for the plaintiffs.

PARK, J.—I am of the same opinion. It is said that this contract is void by the statute or at common law. As to the first point, it seems to me, upon consideration and by the weight of the authorities, that the case is not within the statute at all, because the statute does not apply to transactions in foreign

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funds. That the statute is only applicable to the *English* funds seems to be evident, because it refers to contracts in the nature of putts and refusals, which must refer to contracts relating to the funds of this country : and the *tenth* section, which refers to the transactions of the accountant-general of the Court of Chancery, ought to have its due weight, as shewing that the statute did not refer to foreign stocks and securities. In *Henderson v. Bise* (q), Lord *Tenterden* said, that the act did not apply to foreign securities; and there is nothing to be found contrary to this, except the *dictum* of Chief Justice *Dallas*, in *Rossum v. Taylor* (r); and there the learned judge admits that the act was nominally applicable to the *British* funds only, and the case never came before the court *in banc*. Then it is said, that this is an illegal transaction at common law. If this were so, I think we should find something in the preamble of the statute, to shew it; but a reference to that rather proves the contrary, for it speaks of a practice which was then growing up, and the statute is not in any way declaratory.

VAUGHAN, J.—I am also of opinion, that this transaction is not illegal by the statute or at common law. The statute is penal in its language, and I do not see any words by which it can be extended to include foreign funds. Then is it illegal at common law? No authority has been cited to shew that it is; and this action is brought by agents who made the contract for a third person.

BOSANQUET, J.—I am of opinion, that it does not clearly appear on this record, that the contract is void by the statute or at common law. The statute imposes very penal consequences; it avoids the contract, and also gives an action for the recovery of the money, with double costs, and adds other penalties. The preamble adverts to the destructive practice of stock-jobbing, and the question is, whether it relates to the stocks of foreign states. In considering an act so penal in its consequences, we ought not to extend it by implication. It is a prospective statute, by no means declaratory, and when we find the expression "public stocks" used in the statute, we must intend the public stocks of this country. I do not so much rely on the tenth section, which relates to the transactions of the accountant-general, as I do upon the general effect of the enactments, which was considered in *Henderson v. Bise* (q), where Lord *Tenterden*, C. J., held, that *Colombian* bonds were not within the statute. I am, therefore, of opinion, that this case is not within the statute.

The next question is, whether the contract is illegal at common law. The contract is for work and labour, and money paid, and it is admitted, that it was done at the defendant's request. We have been referred to Lord *Tenterden's* opinion, in *Bryan v. Lewis* (t), to shew that this contract would be void at common law; but that opinion can only be used as a *dictum*, because the decision was, that the defendant was not authorized to make the contract, and there were other circumstances in the case, which did not entitle the plaintiff to have his claim enforced. But, comparing that decision with this case, there is a distinction observable between them. In that case there was no reasonable expectation that the defendant would ever obtain the pro-

(q) 3 Stark. N. P. C. 168.

(t) Ryan & Moody. N. P. C. 386.

(r) Chitty's Statutes, 1032, note (b).

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But, further, it is to be remarked that this statute carries with it very severe consequences; one of them is, that after a party has become liable to a penalty, he may be put on his oath touching the offence; and such a statute ought not to be enlarged beyond its fair and natural meaning, nor ought it to be extended by any intendment which might be engrafted upon it.

Upon looking at the *tenth* section, which enacts that the provisions of the statute shall not extend to any contract relating to stock or other public securities, made by the accountant-general, it is clear that the stock which is there meant, is stock of this kingdom; for it is well known that the accountant-general never purchases any other description of stock: and although that does not conclusively establish that the statute does not generally apply to other kinds of stocks, yet it affords an inference to shew what was in the contemplation of the legislature. As far, therefore, as the statute is concerned, I am of opinion that this case is not within its provisions.

Then it is objected that these contracts are illegal at common law, and that work and labour, bestowed in carrying them into effect, would also be illegal. In the first place, it has not been very distinctly shewn that these wagers were illegal at common law; for it is to be observed, that the words of the statute are words of enactment, and are not declaratory; and the statute does not seem to recognize the dealing in stock as being then an offence. The most that could be said is, that the contracts are void; and as the work and labour is one degree further removed, I cannot see my way with sufficient clearness to say that it is illegal at common law. Our judgment must, therefore, be for the plaintiffs.

PARK, J.—I am of the same opinion. It is said that this contract is void by the statute or at common law. As to the first point, it seems to me, upon consideration and by the weight of the authorities, that the case is not within the statute at all, because the statute does not apply to transactions in foreign

funds. That the statute is only applicable to the *English* funds seems to be evident, because it refers to contracts in the nature of putts and refusals, which must refer to contracts relating to the funds of this country: and the *tenth* section, which refers to the transactions of the accountant-general of the Court of Chancery, ought to have its due weight, as shewing that the statute did not refer to foreign stocks and securities. In *Henderson v. Bise* (q), Lord *Tenterden* said, that the act did not apply to foreign securities; and there is nothing to be found contrary to this, except the *dictum* of Chief Justice *Dallas*, in *Rossum v. Taylor* (r); and there the learned judge admits that the act was nominally applicable to the *British* funds only, and the case never came before the court *in banc*. Then it is said, that this is an illegal transaction at common law. If this were so, I think we should find something in the preamble of the statute, to shew it; but a reference to that rather proves the contrary, for it speaks of a practice which was then growing up, and the statute is not in any way declaratory.

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(q) 3 Stark. N. P. C. 158.

(t) Ryan & Moody. N. P. C. 386.

(r) Chitty's Statutes, 1032, note (b).

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perty for which he contracted, but here the defendant had a reasonable expectation of obtaining the object of the contract, for the averment that the plaintiffs knew that the defendant and other persons were not possessed of the stock, does not negative that the plaintiffs had not an expectation of being possessed of it. The cases, therefore, differ in one of the most important ingredients. The contract may be void, but it does not therefore follow, that an agent who made the contract may not bring an action for work and labour.

Judgment for plaintiffs (a).

(a) See *Oakley v. Rigby*, ante, 42, and *Morgan v. Pebrer*, 3 Hodges.

April 27th.

DOBREE v. NAPIER and another.

1. In trespass for taking a steam-vessel, the defendant pleaded that he was an admiral in the Portuguese navy, and that he took the vessel as a lawful prize, which was condemned by the Supreme Tribunal of Marine, at Lisbon, and became forfeited to the queen of Portugal. In other pleas the trespass was justified under the authority of the queen of Portugal, *jure belli*. Replication, that the defendant, being a natural born subject of his majesty, in contravention of stat. 59 G. 3. c. 69, (the Foreign Enlistment Act.) accepted the commission of admiral, without the leave and license of the king of England:—Held, that the pleas were a conclusive bar to the action, and that the replication afforded no answer to the pleas.

TRESPASS for seizing and taking a steam-vessel of the plaintiff, called the *Lord of the Isles*.

Pleas—First, not guilty. Second—That before and at the time when, &c., in the declaration mentioned, the defendant was employed and retained in the service of Donna Maria, queen of Portugal, as an admiral in the Portuguese navy, and chief commander of a certain squadron thereof, the said queen of Portugal, during the time aforesaid, being at peace with our sovereign lord William IV.; and that before and at the time when, &c., divers enemies of the said queen were waging war against her, both by sea and land; and thereupon, and before the said time when, &c., the said queen had commanded the defendant, as such admiral and chief commander as aforesaid, to establish and proclaim a blockade along the coast of Portugal, and the defendant, in obedience to the said command of the said queen, had before the time when, &c., duly established and proclaimed a good and sufficient blockade along the said coast of Portugal; and had put and placed divers, to wit, fifty ships of war, in and upon the high seas along the said coast, for the purpose of supporting and maintaining the said blockade; which blockade the last mentioned ships were sufficient to maintain and support, and did in fact maintain and support; of all which premises the plaintiff had notice. And that after the said blockade had been so established and proclaimed as aforesaid, and while the same was so supported and maintained, the said steam-vessel, in the declaration mentioned, just before the said time when, &c., being on the high seas, by and with the consent and under the authority and direction of the plaintiff, did break the said blockade contrary to the law of nations in that behalf; whereupon the defendant, as such admiral and chief commander as aforesaid, and as the servant and by the command of the said queen, at the said time when, &c., did seize and take the said steam-vessel, in the declaration mentioned, as he lawfully might, for the cause aforesaid.—Conclusion with a verification.

Third plea—That before and at the time when, &c., in the declaration mentioned, the defendant was employed and retained in the service of Donna Maria, queen of Portugal, as chief commander of a certain squadron of the

2. In another plea, the defendant pleaded, that the plaintiff had, without the leave and license of his majesty, the king of England, equipped the steam-vessel for the service of a foreign prince, contrary to the said statute, 59 G. 3. c. 69, whereby the said vessel was forfeited to his said majesty:—Held, that this plea was insufficient, because it shewed no authority in the defendant to seize the vessel.

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Portuguese navy, the said queen then being at peace with our said sovereign lord the king; and that before and at the time when, &c., divers enemies of the said queen were waging war against her, both by sea and land, whereof the plaintiff then had notice: and that just before the said time when, &c., the said ship or steam-vessel, in the declaration mentioned, laden with war-like stores and ammunition, by and with the consent and under the direction and authority of the plaintiff, was on the high seas, aiding and assisting the said enemies of the said queen; whereupon the defendant, as such chief commander, as last aforesaid, and as the servant and by the command of the said queen, at the said time when, &c., attacked and captured, seized and took the said steam-vessel, in the declaration mentioned, as he lawfully might, for the cause aforesaid.—Conclusion with a verification.

Fourth plea—That before and at the time when, &c., the said steam-vessel, in the declaration mentioned, was in a certain port upon the coast of *Portugal*, to wit, the port of *St. Martinho*, and the said steam-vessel had, just before the said time when, &c., discharged a cargo at the said port, destined for the use of certain persons then being enemies of *Donna Maria*, queen of *Portugal*, the said queen then being at peace with our said sovereign lord the king; that thereupon the defendant, claiming to be and acting as admiral and chief commander of a certain squadron of the *Portuguese* navy, and as servant of the said queen, and by her command, at the said time when, &c., attacked, captured, seized, and took the said steam-vessel, in the declaration mentioned, as lawful prize; and such proceedings were thereupon had according to the law of *Portugal*, in a certain court of law in the kingdom of *Portugal*, of competent jurisdiction in that behalf, to wit, the Supreme Tribunal of Marine, at *Lisbon*; that afterwards, to wit, on, &c., at *Lisbon*, in the kingdom of *Portugal*, in and by the said court, the said steam-vessel, in the declaration mentioned, was adjudged to have been justly and lawfully taken, and was then, in due course and form of law, condemned as lawful prize, and as forfeited to the said queen of *Portugal*.—Conclusion with a verification.

Fifth plea—That the plaintiffs, after the 1st day of *November*, 1819, and during the reign of his present majesty, and before the said time when, &c., not regarding the statute in such case made and provided, were within a certain port of the united kingdom of *Great Britain* and *Ireland*, to wit, within the port of *London*, without the leave and license of his said majesty for that purpose first had and obtained, knowingly concerned in the equipping and furnishing of the said steam-vessel, in the declaration mentioned, with intent that the same should be employed in the service of a certain foreign prince, to wit, *Don Miguel*, of *Portugal*, as a transport and store-ship, contrary to the said statute; and by virtue and force of the said statute, the said steam-vessel, afterwards and before the said time when, &c., became and was forfeited to his said majesty.—Conclusion with a verification.

Sixth plea—That the said steam-vessel, in the declaration mentioned, was not the property of the plaintiffs.—Conclusion to the country.

Replication.—The plaintiff joined issue on the plea of not guilty.

To the second plea, he replied, that before and at the time when, &c., he and also the said defendant were natural born subjects of his present majesty *William IV.*, and the said steam-vessel was a *British* registered vessel, and entitled to all and every the privileges and advantages belonging to such *British* registered vessel. That after the 1st of *November*, 1819, and during the reign of

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his said present majesty, and before the said time when, &c., the said defendant, being such natural-born subject of his majesty, as aforesaid, and not regarding the statute in such case made and provided, without the leave or licence of his majesty in any form whatever, accepted a commission or appointment as an officer in the service of a certain foreign power, that is to say, accepted the office of admiral in the *Portuguese* navy, and chief commander of a squadron thereof, in the service of the said Donna Maria, queen of *Portugal*, as in the said second plea mentioned, and continually from thence, and at the said time when, &c., was employed and engaged in the service of the said Donna Maria, and served in and on board divers ships and vessels of war of the said Donna Maria, and in and on board divers other ships and vessels used by her for warlike purposes, and in her service, contrary to the said statute. That the said defendant, at the said time when &c., whilst he was such officer, and so employed and engaged as aforesaid, and by virtue and in the course of such illegal employment and service, seized and took the said steam-vessel of the plaintiff, as in the declaration mentioned.—Conclusion with a verification.

To the third and fourth pleas a similar replication.

To the fifth plea, a special demurrer, and the following causes of demurrer were assigned:—that it was not alleged in the said plea that the said steam-vessel was ever seized or condemned as forfeited, or that the defendant had any authority from his majesty to seize the said steam-vessel.

To the sixth plea, a special demurrer; and it was assigned for cause, that the defendant had not thereby traversed or denied, or attempted to put in issue, any allegation in the declaration, but had attempted to put in issue a matter of fact not necessary to be alleged; and, also, that it contained new matter not anywhere before alleged, and concluded to the country, and not with a verification; that the defendant attempted to raise a question whether the vessel was the property of the plaintiff, whereas the action would be supported by shewing a mere possession of the plaintiff, at the time the trespass was committed.

Demurrer and joinder, to the replication to the second, third, and fourth pleas; and joinder to the demurrers, to the fifth and sixth pleas.


Stephen, Serjt., for the plaintiff. (*Wilde*, Serjt., and *Martin* were with him.) He supported the demurrers to the fifth and last pleas, and shewed cause against the demurrers to the replication.

I. The first question is, whether the plaintiff or the defendant is entitled to the judgment of the Court on the plea of not guilty, and the three first special pleas. This is an action of trespass, and the plaintiff and the defendant are both *British* subjects. In answer to the justification contained in these pleas, the replication avers, that the defendant had accepted a commission in the service of a foreign power, without obtaining the king's license, in contravention of the Foreign Enlistment Act, 59 G. 3, c. 69 (a). A civil trespass cannot

(a) By 59 G. 3, c. 69, s. 2, if any natural-born subject of his majesty, without the leave or license of his majesty, shall take or accept any commission, &c. in the service of any foreign prince, state, &c., every person so offending shall be deemed guilty of a misdemeanor, and upon being convicted thereof, upon any information or indictment, shall be punishable by fine and imprisonment,

or either of them, at the discretion of the Court before which such offender shall be convicted.

Sect. 7, after imposing a penalty on persons fitting out armed vessels for foreign powers, without license, enacts, "that every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which

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be justified by the defendant shewing that he was engaged in foreign service in violation of an act of Parliament. If, in the course of such an illegal employment, one of the king's subjects was slain, the offence would be murder, or at least manslaughter. The question is, whether a subject of *Great Britain* can justify a trespass against another subject, by setting up an authority conferred by a foreign state? Even if war be declared between this country and a foreign state, a subject is not thereby authorized to assail the foreigner's ships; for Lord *Hale* says (a), "The subjects of either side may not take the goods of others without commission, which is usually granted by the lord admiral; if he doth assail the foreigner's ships, otherwise than in his own defence, without such commission, it is a depredation; for it is not a time of absolute hostility, in respect especially of the king's subjects, but qualified, viz., that commissions shall issue of reprisal to them that desire it." If such a commission be required, even after war is declared, it is obvious that the defendant was not justified in committing this trespass in the very teeth of the statute; it was a mere gratuitous interference.

In *Viner's Abr. tit. Trespass*, (G. a 32,) it is said, "if the sheriff has not any writ, and makes a warrant to J. D. to arrest J. S., an action lies for J. S. against J. D. for this arrest, and against the sheriff likewise." And as the defendant justifies, as an officer of the queen of *Spain*, he ought to shew his warrant. *Viner's Abr. tit. (Trespass), F. a 4. pl. 9.*

In *Wetherell v. Jones* (b), Lord *Tenterden*, C. J., observes, "Where a contract, which a plaintiff seeks to enforce, is expressly or by implication forbidden by the statute or common law, no court will lend its assistance to give it effect." *Bensley v. Bignold* (c) decided, that a printer could not recover for printing a work, unless he affixed his name to it pursuant to the statute; and *Bayley, J.*, said, "The statute establishes several regulations for public purposes. It requires that certain acts shall be done, and makes it penal for any person to neglect to do those acts. The omission to do them, is a direct violation of the law; and a party cannot be permitted to recover for work and labour done in direct violation of the law. Where a provision is enacted for public purposes, I think that it makes no difference, whether the thing be prohibited absolutely, or only under a penalty. The public have an interest that the thing shall not be done, and the objection in this case must prevail, not for the sake of the defendant, but for that of the public." *Lightfoot v. Tenant* (d), and *Langton v. Hughes* (e), are authorities to the same effect; and in *Montefiori v. Montefiori* (f), Lord *Mansfield* says, "That no man shall set up his own iniquity as a defence, any more than as a cause of action;" *Robinson v. Nahon* (g),

may belong to or be on board of any such ship or vessel, shall be forfeited; and it shall be lawful for any officer of his majesty's customs or excise, or any officer of his majesty's navy, who is by law empowered to make seizures for any forfeiture incurred under any of the laws of customs or excise, or the laws of trade and navigation, to seize such ships and vessels aforesaid, and in such places and in such manner in which the officers of his majesty's customs or excise, and the officers of his majesty's navy, are empowered respectively to make seizures under the laws of customs and excise, or under the laws of trade and navigation; and that every such ship and vessel, with the tackle, &c. together with all the materials,

arms, ammunition, and stores, which may belong to or be on board of such ship or vessel, may be prosecuted and condemned in like manner and in such courts as ships or vessels may be prosecuted and condemned for any breach of the laws, made for the protection of the revenues of customs and excise, or of the laws of trade and navigation."

(a) Lord *Hale's Treatise*, part 3, cap. 28, published in 1 *Hargrave's Tracts*, 245.

(b) 3 B. & Ado. 225.

(c) 5 B. & Ald. 335.

(d) 1 Bos. & P. 551.

(e) 1 M. & S. 593.

(f) 1 W. Black. 363.

(g) 1 Camp. N. P. C. 245.

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*Doe d. Roberts v. Roberts* (h), *Allen v. Wood* (i). It was the duty of the defendant to obey the laws of his own sovereign. *Huberus* has laid down the following doctrine. He says, "If the law of another country is in conflict with that of our own state, in which also a contract is made conflicting with a contract celebrated elsewhere, we should in such a case rather observe our own law than the foreign law." (j) Lord *Hale* (k) also says, "That though there may be due from the same person subordinate allegiances, which, though they are not without an exception of the fidelity due to the superior prince, yet are in their kind *sacramenta ligea fidelitatis*, or subordinate allegiances, yet there cannot, or at least should not, be two or more co-ordinate absolute ligances by one person to several independent or absolute princes; for that lawful prince that hath the prior obligation of allegiance from his subject, cannot lose that interest without his own consent, by his subject's resigning himself to the subjection of another."

II. As to the fifth plea, it is clear that the matter there alleged is insufficient. It is founded upon the 7th section of the 59 G. 3, c. 69, and it is alleged the vessel was forfeited to the king. But a mere forfeiture, without a seizure, would not divest the property in the vessel out of the plaintiff. The king can take nothing, except by an inquest of office, and until an office be found, the property does not vest. 3 *Black. Comm.* 259.

III. The sixth plea alleges that the vessel was not the property of the plaintiff. The plaintiff is not bound to prove that she was his property, as mere possession was sufficient to maintain the action. *Heath v. Milward* (l), *Sutton v. Buck* (m). *Com. Dig.* tit. *Pleader*, (3 M. 9.) Ib. tit. *Trespass* (B. 4.) *Vin. Abr.* tit. *Trespass*, (L. a 4.) *Pitts v. Gaince* (n), *Brooke v. Brooke* (o). [*Tindal*, C. J.—The plaintiff should take issue upon this plea. If he had only the temporary command of the vessel, smaller damages would be given, and it is a proper issue to be raised.] *Stephen* thereupon craved leave to withdraw the demurrer as to this plea.

*Crowder*, for the defendant.—The question before the Court is of great public importance, and the books do not contain any case involving similar principles.

I. The act complained of was lawfully done by a foreign state. The queen of *Portugal* had full power to authorize her servants to do the act. The blockade, which is stated in the second plea, was lawful, and the plaintiff broke the blockade, contrary to the law of nations. *Vattel's Law of Nations* (p). The third plea, shews that the plaintiff was aiding and assisting the enemies of the queen; and the fourth plea alleges the condemnation of the vessel, as a lawful prize, by a Court of competent jurisdiction. As far as this plea is concerned, the plaintiff is come to the wrong tribunal, because this Court cannot entertain the question of prize or no prize. [*Tindal*, C. J.—That is decided in *Le Caux v. Eden*, 2 Doug. 594.] If, therefore, this plea stood alone, the justification is complete. But by the replication, the plaintiff relies on the provisions of the Foreign Enlistment Act. It is clear that the plaintiff's vessel has contra-

(h) 2 B. & Ald. 367.

(i) 1 Bing. N. C. 8.

(j) *Huberus*, Lib. 1, tit. 3, s. 11; and see also *Story's Commentaries on the Conflict of Laws*, 269, and note (b) *post*, page 92.

(k) 1 *Hale's Pleas of the Crown*, 65.

(l) 2 Bing. N. C. 98; 1 *Hodges*, 198.

(m) 2 *Taunt.* 302.

(n) 1 *Salk.* 11.

(o) *Siderfin*, 184.

(p) *Book 3*, ch. viii. §. 117.

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vened the law of nations; but it is said that the person who seized the vessel has disobeyed the law of *England*, and that the plaintiff has therefore a right to sue for damages. It must therefore be assumed, that the vessel was properly lost, but that the defendant is nevertheless liable to pay damages. Now by the 59 G. 3, c. 69, the defendant was, without doubt, guilty of a misdemeanor, and he might have been punished by fine or imprisonment. The entering into the service of a foreign state, without the king's leave, and not the seizing of the vessel, is the offence of which he was guilty. In taking the vessel, he was doing a justifiable act as the servant of the queen of *Portugal*. By stat. 5 Eliz. c. 4, s. 47, it is enacted, that, if any servant or apprentice unlawfully depart or flee into any other shire, the sheriff shall put him in prison. Suppose another takes such a servant into his employ, and whilst he is in such service, he seizes cattle damage feasant on his master's lands, could he not justify doing the act, as the servant and by the command of his master? This test is conclusive in deciding the question. Here it is admitted that the act was justifiable, when done by the queen of *Portugal*, and that she gave the command to the plaintiff is also admitted. The cases which have been cited, to shew that no man can defend himself by his own iniquity, are not disputed; but the distinction is, that here the defendant justifies himself under the authority of a third party. The general rule is, that if two are sued, and one justifies as a principal, and the other as a servant, the defence of both stands or falls together. If the queen had been made a co-defendant, it must be admitted that she is not liable to be sued; therefore it would be an anomaly to hold that her servant shall not justify under her authority.

II. It may be questionable whether the defendant has not been guilty of piracy, within 11 & 12 W. 3, c. 7, s. 8, which enacts, that if any of his majesty's natural-born subjects, or denizens of this kingdom, shall commit any piracy, or robbery, or any act of hostility against others his majesty's subjects upon the sea, under colour of any commission from any foreign prince or state, on pretence of authority from any person whatsoever, such offenders shall be deemed, adjudged, and taken to be pirates, felons, and robbers. If this argument be well-founded, then the personal injury is merged in the felony, and the plaintiff cannot recover. [*Tindal*, C. J.—That act is *diverso intuitu*. It applies only to offences committed under colour of a commission, where the act is committed *lucri causâ*.] Suppose a man justified under a commission from the dey of *Algiers*? [*Tindal*, C. J.—The whole record must be taken together; these pleas justify *jure belli*.]

III. The fifth plea affords an answer to the declaration. By the 59 G. 3, c. 69, s. 7, if any person, without the leave of his majesty, shall equip any vessel, in order that he may be employed in the service of any foreign prince, such person is declared guilty of a misdemeanor, and the vessel shall be forfeited. [*Tindal*, C. J.—But that would not authorize a stranger to seize the vessel.] The plaintiff was doing an illegal act, and this is like the case of the highwayman, who filed a bill in chancery against his companion, for an account of the profits of their joint exploits. [*Tindal*, C. J.—That is one of the anecdotes of *Westminster Hall*.] By the illegal act which was done, the property in the vessel was divested out of the plaintiff altogether. In *Bensley v. Bigsby* (9), it was held that a printer could not recover for printing a work, when

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he had neglected to affix his name to it, pursuant to the 39 G. 3, c. 79, s. 27. Nor can the publisher of a libellous or immoral work maintain an action against any person for publishing a pirated edition. *Stockdale v. Onwhyn* (r). The same principle is to be found in *Du Bost v. Beresford* (s). In *Wilkins v. Despard* (t), it was decided, that if a ship be seized, as forfeited, under the Navigation Act, 12 Car. 2, c. 18, by a governor of a foreign country, belonging to Great Britain, the owner cannot maintain trespass against the party seizing, although the latter do not proceed to condemnation, for by the forfeiture, the property is divested out of the owner. That case is quite in point with the present, and shews that the property was divested out of the plaintiff, and therefore he has no right to support this action.

*Stephen*, in reply.—This trespass was committed by a *British* subject upon the property of a *British* subject, in time of peace, and therefore the argument *de jure belli* does not apply. It is said, that the offence committed by the defendant, was the entering in the service of the queen of *Portugal*, without the king's license; but if the acceptance of the commission was illegal, every act which was subsequently done, was also illegal. The peace of the kingdom was endangered, by the enlistment of the king's subjects to serve in war in foreign service, as appears in the preamble of the 59 G. 3, c. 69; and it appears to have been also an offence at common law. Lord *Coke* says, "It is not lawful for any subject of the king of *England* to take a pension, &c., of any foreign king, prince, or state, (without the king's license), albeit they be in league with the king of *England*, both for that they may become enemies, and for that also it is mischievous and dangerous to the king himself and his state (u). *Hawk. Pleas of the Crown*. Book i. c. 3, s. 30.

The right of keeping a blockade, and seizing vessels which break it, refers to the violated rights of the belligerent powers. Here the seizure was made by the defendant, and he cannot set up the right of the belligerent power, because he was unlawfully engaged in the service of that power. As to the argument on the fourth plea, it is true that the Court will not entertain the question of prize or no prize, *Faith v. Pearson* (v), *Le Caux v. Eden* (w); but this is a question relating to an *English* statute. Thus the Court cannot decide on the privileges of Parliament, but they may decide whether a particular case is within the privilege or not. *Jay v. Topham* (x).

II. The fifth plea cannot be sustained. A violation of the law by the plaintiff, does not justify a violation of the law by the defendant. The property in the vessel was not divested out of the plaintiff until a forfeiture had taken place, upon office found. By the statute, the vessel is forfeited to the king, but it does not enable a private person to seize without any authority from the crown. *Du Bost v. Beresford* (s), and the other cases cited, are quite distinguishable from the present.

*Cur. adv. vult.*

TINDAL, C. J.—The plaintiff declares in this action against the two defendants, for seizing and taking a steam-vessel of the plaintiff, and converting

(v) 5 B. & Cress. 173.

(s) 2 Camp. N. P. C. 511.

(t) 5 T. Rep. 112.


(u) 3 Inst. 144; and see *ib.* p. 178, the

(r) 6 Taunt. 439.

(w) 2 Doug. 594.

(x) Cited in *Burdett v. Abbot*, 1 East.

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the same to their use. The defendants sever in their pleadings, but each puts upon the record substantially the same justification, to which the answers given by the replication are the same, and the same questions of law are raised thereon. It will be sufficient therefore to consider the case as it is stated upon the pleadings, with respect to the first-named defendant, *Charles Napier*.

The third special plea of the defendant, *C. Napier*, alleges that, as the servant of the queen of *Portugal*, and by her command, he seized and took the steam-vessel of the plaintiffs as lawful prize, and that such proceedings were thereupon had, according to the laws of *Portugal*, in a court of law in the kingdom of *Portugal*, of competent jurisdiction in that behalf; that afterwards, in and by the said court, the said steam-vessel was adjudged to have been justly and lawfully taken, and was then, in due course and form of law, condemned as a lawful prize, and as forfeited to the queen of *Portugal*. In answer to this plea, the plaintiffs, in their replication, allege certain facts, which bring the service of the defendant, *C. Napier*, under the queen of *Portugal*, upon the occasion in question, within the restrictions of the stat. 59 G. 3, c. 69, s. 2, generally known by the name of the Foreign Enlistment Act, and to this replication the defendant demurred. We think it perfectly clear that, except for the facts introduced by the replication, the plea standing alone, and unanswered, would be a conclusive bar to the plaintiff's right of action.

The sentence of a foreign court of competent jurisdiction, condemning a neutral vessel taken in war as prize, is binding and conclusive on all the world; and no *English* court of law can call in question the propriety or the grounds of such condemnation. It is sufficient to refer to the case of *Hughes v. Cornelius and others* (a) as a decisive authority on that point. It follows that, after the sentence of the court of *Lisbon*, it cannot be controverted in this or any other *English* court that the steam-vessel was rightfully taken by the queen of *Portugal* as prize, and that all the property of the plaintiffs therein became, by such capture and condemnation, forfeited to the queen, and vested in her.

But the plaintiffs contend, that the replication, by the facts therein disclosed, shews that the service of the defendant, *C. Napier*, under the queen of *Portugal*, by virtue of which service alone he justifies the seizing of the steam-vessel, is made illegal by an *English* statute, viz., the statute 59 G. 3, c. 69; and that such illegality of the service prevents him from making any justification under the queen of *Portugal*, and renders him liable for all the damages which the plaintiffs have sustained by reason of the seizure; and whether the conclusion which the plaintiffs draw from these premises is the just conclusion or not, is the question between these parties. The seizure by the queen of *Portugal* must be admitted to be justifiable; no objection can be taken against the forfeiture of the property in this vessel to the queen, under the sentence of condemnation. The plaintiffs, therefore, in contemplation of law, have sustained no legal injury by reason of the seizure.

Again, no one can dispute the right of the queen of *Portugal* to appoint, in her own dominions, the defendant, or any other person she may think proper to select as her officer or servant, to seize a vessel which is afterwards condemned as a prize, or can deny that the relation of lord and servant, *de facto*, subsisted between the queen and the defendant *Napier*; for the queen of *Portugal* cannot be bound to take any notice of, much less owe any obedience to,

(a) Sir T. Raym. 473.

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the municipal laws of this country (b). Still, however, notwithstanding the loss by seizure is such as that no court of law can consider it an injury, or give any redress for it, and that the service and employment of the defendant is a service and employment, *de facto*; the plaintiffs contend they can make the servant responsible for the whole loss, only by reason of his being obnoxious to punishment in this country for having engaged in such service. No case whatever has been cited which goes the length of this proposition; the authorities referred to establishing only, that, where an act, prohibited by the law of this country, has been done, the doer of such illegal act cannot claim the assistance of a court of law in this country to enforce such act, or any benefit to be derived from it, or any contract founded upon it. To the full extent of these authorities we entirely accede; but we cannot consider the law to be, that where the act of the principal is lawful in the country where it is done, and the authority under which such act is done is complete, binding, and unquestionable, there the servant who does the act can be made responsible in the courts of this country for the consequences of such act, to the same extent as if it were originally unlawful, merely by reason of a personal disability imposed by the law of this country upon him for contracting such engagement. Such a construction would effect an unreasonable alteration in the situation and rights of the plaintiffs and the defendant. The plaintiffs would, without any merit on their part, recover against the servant, the value of the property to which they had lost all claims and title by law against the principal; and the defendant, instead of the measure of punishment intended to be inflicted by the statute for the transgression of the law, might be made liable to damages of an incalculable amount. Again, the only ground upon which the authority of the servant is traversable at all, in an action of trespass, is no more than this, to protect the person or property of a party from the officious and wanton interference of a stranger, where the principal might have been willing to waive his rights.

It is obvious, that the full benefit of this principle is secured to the plaintiffs, by allowing a traverse of the authority, *de facto*, without permitting them to

(b) This subject is discussed by Professor Story in his admirable Commentaries on the Conflict of Laws, Ch. II. § 20. He says, "Another maxim or proposition is that no state or nation can by its laws directly affect or bind property out of its own territory, or persons not resident therein, whether they are natural-born subjects or others. It would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories. It would be equivalent to a declaration, that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules which none were bound to obey. The absurd result of such a state of things need not be dwelt upon. Accordingly, *Rondenburg* has significantly said, 'that no sovereign has a right to give the law beyond his own dominions: and if he attempts it, he may be lawfully refused obedience, for wherever the foundation of laws fails, there their force and jurisdiction

fail also. *Constat igitur extra territoria legem dicere licere nemini, idque si fecerit, quia, impune ei non pareri, quippe ubi consuetudinem statutorum fundamentum, robur, et iurisdiclio*, 1 Boull, des Statut. Princip. Gen. 6, p. 4. B.

"Upon this rule there is often engrained an exception of some importance to be rightly understood. It is, that although the laws of a nation have no direct binding force or effect, except upon persons within its territories, yet every nation has a right to bind its own subjects by its own laws in every other place. In one sense this exception may be admitted to be correct, and well founded in the practice of nations; in another sense it is incorrect, or at least requires qualification. Every nation has hitherto assumed it as clear, that it possesses the right to regulate and govern its own native-born subjects everywhere; and consequently, that its laws extend to, and bind such subjects at all times, and in all places. This is commonly adduced as the consequence of what is called national allegiance, that is of allegiance to the government of the territory of a man's birth: 1

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impeach it by a legal objection to its validity in another and foreign country; and we think there is no material difference between the third, and first and second special pleas on this record; for we hold the authority of the queen of *Portugal* to be a justification of the seizure as prize. There is as little doubt that she might direct a neutral vessel to be seized, when in the act of breaking a blockade by her established, which is the substance of the first special plea, or of supplying warlike stores to her enemies, which is the substance of the second. We therefore give judgment, on the first three special pleas, for the defendant. As the determination on these pleas, in effect, decides the main question in the cause in favour of the defendants, it becomes unnecessary to consider the special pleas which are fifthly pleaded by each defendant, and to which the plaintiffs have demurred, except so far as the costs of those pleas may be concerned in the inquiry. By the fifth plea, the defendants set up, on their part, as a bar to the plaintiffs' right of action, certain facts and circumstances, from which it appears that the plaintiffs had themselves been guilty of a violation of the statute 59 G. 3, c. 69, whereby the steam-vessel became and was forfeited to his majesty. Now, one of the objections taken to this plea was, that the defendants shew no authority to seize the vessel; and we are of opinion that the plea is insufficient, upon this ground. No case can be cited in which a justification in trespass is made under the right of another person, without alleging an authority from the principal, under whose right the act complained of was committed. If the defendant justifies the breaking of a close, on the ground that it is the freehold of another, he is bound to state that he did so enter by the command, and as the servant, of the owner of the close. *Chambers v. Donaldson* (c). So, where a man justifies the seizing of a heriot, where the property is in the lord of a manor, he shews his authority from the lord, for, in these and similar cases, *non constat*, that the party entitled would have ever insisted on his right; and there can be no reason, if he should prefer to waive it, why a stranger should justify himself in standing in his place. The

Black. Com. 369; and he proceeds to distinguish it from local allegiance, which is such as is due from an alien or stranger born, for so long a time as he continues within the dominions of a foreign prince. The former is universal and perpetual; the latter ceases the instant the stranger transfers himself to another country, and it is therefore local and temporary. *Vattel*, on the other hand, seems to admit the right of allegiance not to be perpetual, even in natives; and that they have a right to expatriate themselves, and, under some circumstances, to dissolve their connexion with the parent country, (*Vattel*, b. 1, ch. 19, 220 to 228.)

“ Without entering upon the subject, which properly belongs to a general treatise upon public law,) it may be truly said that a nation is bound to respect the laws of another nation made in regard to subjects who are non-residents. The obligatory force of such laws cannot extend beyond its own territories; and if such laws are incompatible with the laws of the country where they reside, or interfere with the duties which they owe to the country where they reside, they will be disregarded by the latter. Whatever may be the obli-

gatory force of such laws upon such persons, if they should return to their native country, they can have none in other nations where they reside. They may give rise to personal relations between the sovereign and subjects to be enforced in his own domains; but they do not rightfully extend to other nations. *Clauduntur territorio*. Nor indeed is there, strictly speaking, any difference in this respect, whether such laws concern the persons or the property of native subjects. A state has just as much intrinsic right, and no more, to give to its own laws an extra-territorial force, as to the property of its subjects situated abroad, as it has in relation to the persons of its subjects domiciled abroad. That is, as sovereign laws, they have no obligation or power over either. When, therefore, we speak of the right of a state to bind its own native subjects everywhere; we speak only of its own claim and exercise of sovereignty over them, and not of its right to compel or require obedience to such laws on the part of other nations. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its own sovereign will and polity.”

(c) 11 East, 65.

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case of *Wilkins v. Despard* has been cited as an authority to shew that, where a ship has been forfeited by breach of the provisions of an act of Parliament, the owner cannot maintain trespass against the party seizing it, although the latter do not proceed to condemnation, for, as it is said by the Court, by the forfeiture, the property is divested out of the owner; but the plea in that case will be found to stand clear of the objection urged against that which is now under consideration. In the case cited, the plea alleges that the defendant seized the ship as forfeited to the use of his majesty and of himself, the defendant. The defendant, therefore, was not a stranger, but had authority to seize, in right of himself, as to part of the ship. Here the forfeiture is given to his majesty only; and the plea is so far from stating that the defendant was authorized by his majesty to seize, that it does not even state that it was seized for the use of the king, or even as forfeited. Upon this ground, we think, that the judgment of the Court on the plea fifthly pleaded by each of the defendants, must be against the defendants. Upon the whole, the general judgment of the Court is for the defendants.

Judgment for the defendant.

April 18th.

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The 9 G. 4, c. 14, sec. 1, directs, that no acknowledgment or promise shall be sufficient to take a case out of the Statute of Limitations, unless it be in writing, "and signed by the party chargeable thereby;" —*Held*, that an acknowledgment contained in a letter which was written by the wife of the defendant, in his name and at his request, was insufficient, because the statute gives no authority to an agent to make the acknowledgment.

ASSUMPSIT for goods sold and delivered, and for money due on an account stated. *Plea*—The Statute of Limitations. The cause was tried before the undersheriff for *Middlesex*. It was in evidence, that the wife of the defendant had written a letter to the plaintiff, at the defendant's request, and in his name, in which the debt was acknowledged, and a promise to pay it by instalments was made. The defendant delivered this letter to a carrier, and desired him to give it to the plaintiff.

It was objected, for the defendant, that this acknowledgment was not sufficient to take the case out of the statute, inasmuch as it was not signed by the defendant himself, in pursuance of stat. 9 G. 4, c. 14, s. 1. The objection was overruled, and a verdict was found for the plaintiff.

Chilton obtained a rule *nisi*, in pursuance of leave reserved, to enter a nonsuit, upon the above ground. He cited *Gibson v. Baghott* (a).

Byles shewed cause:—

I. A written acknowledgment by an agent is sufficient. The 9 G. 4, c. 14, sec. 1, requires that the acknowledgment or promise shall be made by the party "chargeable thereby;" and it is clear, under the stat. 21 Jac. 1, c. 16, that the husband was bound by the admissions made by his wife. *Anderson v. Sanderson* (b). If this case had arisen on the pleadings, and the plaintiff had replied that there was a written acknowledgment signed by the defendant, then the evidence which was given at the trial would have supported that allegation. Thus, in *Helmsley v. Loader* (c), the declaration averred, that the defendant's own proper hand was subscribed to a bill of exchange; and it was held sufficient to prove that it was written, under his authority, by his wife.

(a) 5 Car. & Payne, 211.
 (b) 2 Stark. N. P. C. 204.

(c) 2 Camp. N. P. C. 450.

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Heys v. Heseltine (d) is to the same effect. It does not appear to have been the object of the statute to restrain or vary the authority of an agent.

It will be contended, that the Statute of Frauds, 29 Car. 2, c. 3, expressly provides for a signature by an agent. That statute contemplates several kinds of agents. The *fourth* section refers to promises and agreements made by agents; the *fifth*, to devises of lands signed by an agent in the testator's presence, and by his express directions; and the *seventeenth* section has reference to contracts for the sale of goods, signed by the agent of the party to be charged. The rule of law is, that when two statutes are *in pari materid*, that the one shall construe the other. *Gale v. Laurie* (e).

But these statutes are not *in pari materid*, for, as it has been shewn, the stat. 29 Car. 2. had reference to several kinds of agents and it was therefore necessary to mention them particularly. A man may make a bill of exchange, or even a bond, by an agent; and it would be inconvenient and inconsistent to hold that he may not, in like manner, give a written acknowledgment of a debt. In some cases a person might be incapable of writing, or even of making a mark, and then he would be unable to make any valid acknowledgment of a debt.

II. If the acknowledgment must be made by the defendant himself, then the delivery of the letter to the carrier was a sufficient signing of the letter by the defendant. It is analogous to the signing of a deed by a stranger, and a delivery by the grantor, which would be sufficient.—*Perkins*, pl. 13. And in 2 *Black. Com.* 307, it is said, "And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and, by a parity of reason, the signing also, and makes them both his own."

III. The plaintiff is, at all events, entitled to recover on the count on an account stated. In *Smith v. Forty* (f) where an administratrix sued for a debt due to the intestate, and the debt was barred by the statute; but it was proved that, within six years, the defendant and the agent of the administratrix struck a balance, which the defendant promised to pay, it was held that the plaintiff was entitled to recover. That case, therefore, establishes that a man may state an account by his agent.

F. Kelly and Chilton, contrà.—The intention of the stat. 9 G. 4, c. 14, is well expressed by *Tindal, C. J.*, in *Haydon v. Williams* (g). His lordship says, "The statute did not intend to make any alteration in the legal construction to be put upon acknowledgments or promises made by the defendants, but merely to require a different kind of proof, substituting the certain evidence of a writing, signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses." If the argument on the other side should now prevail, the old mischiefs will again revive, as in this case it would be necessary to refer to the parol testimony of the carrier, and other persons, in order to establish the agency. The legislature contemplated the exclusion of such evidence, and therefore the statute did not authorize an admission to be made by an agent. And the cases support this construction. Thus, in *Whippy v. Hillary* (h) Lord *Tenterden, C. J.*, laid particular stress on the words of the statute, "that the acknowledgment must

(d) 2 Camp N. P. C. 604.

(e) 5 B. & Cress. 156.

(f) C. & P. 128.

(g) 7 Bing. 163.

(h) 3 B. & Ado. 399.

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be made *by the party chargeable thereby*;" and in *Gibson v. Baghott (i)*, Parke, J., held that an acknowledgment by an agent would be insufficient. He says, "There is nothing, *signed by the defendant*, which acknowledges any debt due to the plaintiff." In *Lyde v. Barnard (j)*, Gurney, B., in referring to the sixth section of the statute, where the word "agent" is also omitted, observes, "By this clause the protection is carried even further than by the Statute of Frauds. There the party might be charged on a writing, signed by a person thereunto by the defendant lawfully authorized, which left him exposed to be charged by the verbal representation of another that he had authority to sign." An agent is expressly mentioned in the Statute of Frauds; and as this word is omitted in this statute, there can be no doubt but that it was studiously and deliberately excluded by the very learned and accurate framer of the statute.

Cur. adv. vult.

TINDAL, C. J.—The short question in this case is, whether a letter, offering to pay a debt by instalments, written by the defendant's wife to the plaintiff, in her husband's name, and at his request, and afterwards sent by him to the plaintiff, is a sufficient acknowledgment or promise "made or contained by or in some writing signed by the party chargeable thereby," within the meaning of the 9 G. 4, c. 14, s. 1. The question turns entirely on the construction of the statute, and it amounts, in other words, to this—Does the statute 9 G. 4, c. 14, extend to a writing signed by an agent of the party, or is it confined to a writing signed by the party himself? Looking at the words of the statute, it is confined in terms to a writing "signed by the party chargeable thereby;" and, as the effect of that statute is, for the first time, to introduce a legislative exception into the statute of 21 Jac. 1, c. 16, and thereby, *pro tanto*, to repeal it, we do not feel ourselves justified in extending such exception beyond the plain and unambiguous meaning of the words employed therein. The legislature has, in many statutes, given equal efficacy to written instruments, when signed by the parties and when signed by their agents; but, in all those cases, express words have been employed for that purpose. The Statute of Frauds, in its third section, requires, for the purposes of that section, a note in writing, to be signed by the party "or their agents, thereunto lawfully authorized *by writing*;" in the fourth section, a memorandum or note in writing is required, "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized;" in the fifth section, a devise of lands is required to be made in writing, to be "signed by the party so devising, or by some other person, in his presence and by his express directions;" in the seventh section, a declaration of trusts of any lands shall be in writing, "signed by the party;" and, lastly, the seventeenth section requires, upon the sale of goods, that there shall be some note, or memorandum, in writing, of the bargain, "signed by the parties to be charged by such contract, or their agents, thereunto lawfully authorized." It appears, therefore, that the legislature well knew how to express the distinction, not only between a signature by the party and a signature by his agent, but also to describe the different mode by which agents for different purposes are to be appointed. The same observation arises upon referring to the more recent statutes 3 & 4 W. 4, c. 2, s. 42, and c. 42, s. 5. When, therefore, we find, in the statute now under consideration, that it expressly mentions the signature by the party only, we think it a safer construc-

(i) 5 Car. & Payne, 211.

(j) 1 Meeson and Welsby. 104.

tion to adhere to the precise words of the statute; and that we should be legislating, not interpreting, if we extended its operation to writings, signed, not by the party chargeable thereby, but by his agent. And we feel ourselves the more compelled to adopt this construction, as we find the seventh section of this same statute recites the seventeenth section of the Statute of Frauds; so that the legislature must have had in their view, at the very time of passing this statute, and, therefore, must have intended the distinction between writings signed by a party or signed by his agent. Some inconveniences have been pressed, in the course of the argument, upon our attention, in cases where a total inability of parties to sign may exist; but the nature of the signature which is necessary to comply with the requisites of the statute, is such as to make it almost impossible to suppose a case, in which a party could not make such a signature as would satisfy the statute. And, after all, in construing a statute, we must not look to cases of very rare and singular occurrence, but to those of every day's experience; and, whatever may be the consequence, we must interpret the statute according to the plain import of the language employed in it. Upon the whole, we think, in this case, the letter was not a sufficient writing signed by the party, to take the case out of the operation of the enactments of 21 Jac. 1, c. 16; and, therefore, direct a nonsuit.

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Rule absolute.

FINCH v. BROOK^(a).

DEBT, in the county court of *Cambridgeshire*. *Pleas*—*Nil debet*, except as to 1*l.* 12*s.* 5*d.*, parcel, &c., and as to that sum, a tender. The jury found a verdict for the plaintiff on the first issue; and, on the second, they made a statement of the facts which were proved to shew a tender; "but whether or not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid, found, the defendant did tender and offer to pay to the plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., in manner and form as the defendant had above, in his plea, alleged, the jurors were altogether ignorant, and, therefore, prayed the advice of the court." The court below gave judgment for the defendant on the second issue. A writ of false judgment was afterwards sued out by the plaintiff, and the verdict of the court below, as to the second issue, was reversed by this court, upon the ground that the evidence was insufficient to prove a tender ^(b).

Stephen, Serjt., obtained a rule to show cause why judgment should not be entered up for the plaintiff for 1*l.* 12*s.* 5*d.*, with his costs in the court below, and why the prothonotary should not tax the costs, and the plaintiff be at liberty to issue execution to recover the same.

Butt shewed cause.—A general verdict was entered for the defendant, on the second issue, subject to the facts which were stated. The judgment for

In debt, in a county court, the defendant pleaded a tender as to part of the demand, and *nil debet* to the residue. The jury found for the defendant on the latter plea; as to the tender, they found certain facts, but were ignorant whether they amounted to a tender or not. The court below gave judgment for the defendant on this plea also, but it was subsequently reversed on a writ of false judgment, on the ground that the facts found, did not shew a legal tender.—*11/1d.*, that the plaintiff was entitled

^(a) This case was decided in *Michaelmas* Term, 1835.

^(b) See *Finch v. Brook*, 1 Bing. N. C. 253.

to have judgment entered up in his favour on the issue relating to the tender, although the verdict in the court below was not in the alternative, and although the usual nominal damages were not given by the jury.

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the defendant has been reversed, but the plaintiff now seeks to have a verdict entered for him, although the jury have not found the verdict in the alternative. In *Gildart v. Gladstone* (c), Lord Ellenborough, C. J., says, "In this case the judgment below was given for the plaintiffs, upon a special verdict, where, of course, there was an alternate finding by the jury, according as the Court should be of opinion, that the verdict and judgment ought to have been for the plaintiff, or for the defendant; if for the plaintiff, the verdict was to be entered one way; if for the defendant, another way." Here there is no finding in the alternative, and the Court has nothing upon which it can act. *Denn d. Mellor v. Moore* (d) shews, that, upon the reversal of a judgment, the Court ought to give the same judgment that ought to have been given at first, and that judgment ought to be sent to the court below. Here the judgment has been reversed, but it cannot be implied upon the facts or the record, that the judgment ought to have been entered for the plaintiff.

Nor has the Court any jurisdiction to make the rule absolute as prayed. In *Tidd's Prac.*, p. 1188, 9th ed., it is said, "On a writ of false judgment no costs are in general recoverable, and it is, therefore, but seldom advisable to have recourse to this remedy." The record is not removed from the court below, and if a verdict can be entered for the plaintiff at all, it must be done there. There is only a transcript of the proceedings in the county court returned into this court.

Stephen, Serjt., contra, was stopped.

TINDAL, C. J.—It appears to me, upon general principles, and on the authority of *Gildart v. Gladstone* (c), that the Court is bound to give judgment on a writ of false judgment, according to the justice of the case, as it appears on the record. This was an action of debt to recover 1*l.* 13*s.*, and the defendant pleaded to all the demand, except 1*l.* 12*s.* 5*d.*, that he owed nothing, and as to that sum, a tender; the jury have found that the defendant owed nothing beyond 1*l.* 12*s.* 5*d.*; and, on the second issue, there is a special verdict. That special verdict has come before us upon a writ of false judgment, and we were of opinion, that no tender had been made. But it is objected, that the Court will not be justified in directing judgment to be entered up for the sum of 1*l.* 12*s.* 5*d.*, because the jury have not, in terms, found it to be due; the answer is, that this was not necessary, because, if no tender was made, the defendant admitted, on the record, that 1*l.* 12*s.* 5*d.* was the sum which he owed; that being so, the jury had nothing before them upon which they could exercise their discretion.

In strict form, the jury are certainly required to find *one shilling*, as nominal damages for the detention of the debt, but the omission may be aided by a release.—*Bentham's case* (f); 2 *Roll. Abr.* 722, C. 30.

If therefore, the plaintiff will now release the nominal damages, a perfect finding by the jury will appear on the record, for it follows, by necessary intendment, that 1*l.* 12*s.* 5*d.* is due to the plaintiff.

If this had been an imperfect verdict on a plea of *nil debet* only, the cause must have been sent back to the court below; but as 1*l.* 12*s.* 5*d.* appears to

(c) 12 East, 671.
 (d) 1 Bos. & P. 30.

(f) 11 Rep. 56 (a).

be due, by the admission of the defendant, on the record, I am of opinion the damages being released, that the rule should be made absolute.

PARK, J.—I am of the same opinion.

GASELEE, J.—The record is perfect. The declaration is in debt for 1*l.* 13*s.*, and the defendant pleads *nil debet* to the whole demand, except 1*l.* 12*s.* 5*d.*, and as to that sum, a tender. The jury find, as to all beyond 1*l.* 12*s.* 5*d.*, that the plaintiff owes nothing; and, as to the second issue, they find special facts, which, having been brought before this Court, have been held not to shew a legal tender; therefore, as to that sum, the plaintiff is entitled to the judgment of the Court. The only point upon which it is said that the record ought to be sent down again, is, that the usual damages of *one shilling* ought to have been found by the jury; but I agree that the plaintiff may release those damages.

BOSANQUET, J.—The state of the record was such as to raise the question, whether there had been a good tender in law of 1*l.* 12*s.* 5*d.*; that sum was admitted to be due, unless the tender was established. The facts stated did not appear to us to prove a tender, consequently, the judgment must be for that amount, which is admitted to be due on the record.

BUTT suggested, that the rule also prayed for the plaintiff's costs in the court below.

TINDAL, C. J.—The rule must be absolute, as prayed for. The parties must use their own discretion about the costs.

Rule absolute.

BUTT, in this term, obtained a rule *nisi* to set aside an execution which had been issued in the above case, under the following circumstances:—

The plaintiff, without entering any *incipitur* on a roll, had the costs taxed, on the above rule, and the amount indorsed on the back of it, which was signed by the prothonotary. A writ of *fi. fa.* was then obtained, at the proper office, to recover the debt and costs, amounting to 12*l.* The nominal damages were not released. It was submitted, that the proceeding was altogether irregular, because, if the plaintiff had intended to enforce the rule of court, he should have proceeded by an attachment; and, if he proceeded on the judgment, then that the judgment ought to have been regularly signed. The judgment could only have been regularly signed for the debt, 1*l.* 12*s.* 5*d.*; for as no damages were given by the jury, a judgment for debt *and costs* would be bad; and had the plaintiff signed judgment in that form, it would have been error; and this was an attempt to obtain indirectly what could not be obtained directly.

Stephen, Serjt., shewed cause.—If it were necessary to enter up the judgment, it has substantially been done; for the rule of court orders, that judgment shall be entered for the plaintiff, for the debt and costs. There is nothing in the form of the rule to take the case out of the ordinary practice, and, after a verdict, it is usual to sign the *postea*, and the costs are then taxed, and execution issues. It is said, in *Styles (a)*, "Every judgment must be

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On a writ of false judgment from an inferior court, a rule was made absolute to enter up judgment for the plaintiff, and to issue execution for the sum recovered, with costs, to be taxed by the prothonotary. The plaintiff taxed his costs on the back of the rule, and issued execution:—*Held*, that the proceeding was irregular, as no judgment was signed.

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matter of record, but, before the entry, it is not so; the signing of the judgment is but the warrant of the master of the office for the attorney to enter the judgment for his client." In the present case, every thing was done which could be done, under the circumstances of the case. [*Tindal*, C. J.—It may be a question, whether you ought not to have proceeded by attachment. *Vaughan*, J.—*Butler v. Bulkeley* (b) decides, that judgment is not final until the amount of the taxation of costs is inserted in the *allocatur*.] Signing a judgment is only the leave of the master to enter up the judgment, and that execution shall issue; and the rule of court which was obtained in this cause, directs that the judgment shall be entered up, and that the prothonotary should tax the costs. The costs have been taxed on the back of the rule of court.

Butt was stopped by the court.

TINDAL, C. J.—This case has already been before the Court, and, after hearing the parties, we were of opinion, that the plaintiff might sign judgment and issue execution; and we thereby intended, that a regular judgment should be signed. We doubted whether the plaintiff was entitled to his costs, and considered that, if he issued his execution for the costs, the defendant would then have an opportunity of contesting the point. But the plaintiff, instead of taking the usual course, merely had the costs taxed, on the back of the rule, and then issued execution, and we are now to say, whether this is a regular proceeding. It appears to me to be irregular, whether it is considered as a proceeding on the rule, or on the judgment pronounced for the plaintiff. As a proceeding on the rule, there can be no doubt; the remedy upon that would be by an attachment. Is it regular on the judgment? A writ of false judgment is analogous to a writ of error, and the practice on a writ of error is, that the parties should tax the costs, and sign judgment in the usual manner. But nothing of that sort has been done, and it would be giving a most unfair advantage to the plaintiff if we did not discharge this rule. The officers of the court certify to us, that judgment is not considered to be signed until an *incipitur* is first entered on the roll.

Rule discharged.

(b) 8 B. Moore, 104.

BEASLEY v. CLARK.

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In trespass, the defendant justified the trespasses, by claiming a right of way as having been used, of right, and without interruption, for forty years, by the occupiers of his farm.

and the replication traversed the plea generally:—*Held*, that, under this issue, the plaintiff was entitled to shew that the way had been used by his permission, and that he had received small payments as an acknowledgment; and that 2 & 3 W. 4, c. 71, s. 6, which requires, that any agreement or other matter not inconsistent with the simple fact of enjoyment should be specially pleaded, was not applicable to the case.

TRESPASS for breaking and entering two closes, called the *Bottom* and the *Clays*, in the county of *Lincoln*, and breaking the gates of the plaintiff, and treading down and spoiling the grass and herbage in the said closes, and with horses and carriages spoiling and subverting the earth and soil of the said closes, &c.

Pleas.—First, not guilty. Second—And for a further plea in this behalf, as to the breaking and entering the said closes of the said plaintiff, in the said declaration mentioned, and in which, &c., and forcing and breaking open,

breaking to pieces, damaging, and spoiling the gates of the said plaintiff, then standing and being in the said closes respectively, and the locks, staples, and hinges affixed to the said gates; breaking, damaging, and spoiling, and taking and carrying away the materials of the said gates, locks, staples, and hinges; and with feet in walking, treading down, trampling upon, consuming, and spoiling the grass and herbage of the said plaintiff, then growing and being in the said closes respectively; and with the said horses, mares, and geldings, and with the wheels of the said carts, waggons, and carriages, in the said declaration mentioned, crushing, damaging, and spoiling the grass and herbage then growing and being in the said closes respectively; and with the feet of the said horses, mares, and geldings, and with the wheels of the said carts, waggons, and carriages, tearing up, subverting, damaging, and spoiling the earth and soil of the said closes respectively; and breaking down, prostrating, and destroying part of the hedges and fences of the said plaintiff, in the said declaration mentioned; he the said defendant saith, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he the said defendant, long before and at the said several times when, &c., was and still is the lawful occupier of a certain farm, called *Saint Lambert's Farm*, contiguous and next adjoining to the said close, called the *Bottom*, and the occupier for the time being of the said farm of the said defendant, for and during the full period of *twenty years* and upwards, next before the first of the said several times when, &c., and from the commencement of the said period hitherto have, as of right, had and used, and have been accustomed to have and use, without interruption; and the said defendant, at the said several times when, &c., of right, ought to have had and used, and still of right ought to have and use, a certain way for himself and themselves, and his and their servants, to pass and repass on foot and with horses, mares, and geldings, and with carts, waggons, and carriages, to pass and repass from the said farm, in the occupation of defendant, unto, into, through, over, and along a certain part of the said close of the said plaintiff, called the *Bottom*, in which, &c., and so from the said close, called the *Bottom*, unto, into, through, over, and along a certain part of the said close, called the *Clays*, in which, &c., and from the said close, called the *Clays*, unto, into, through, over, and along certain other lands, towards the river *Wellam*, in the county aforesaid, and so from thence back again unto, into, through, over, and along the said part of the said close, called the *Clays*, and from and out of the said close, called the *Clays*, unto, into, through, over, and along the said part of the said close, called the *Bottom*, and from and out of the said close, called the *Bottom*, unto and into the said farm so occupied by the said defendant as foresaid, at all times of the year, at his and their free will and pleasure, as to the said farm of the said defendant, with the appurtenances belonging and appertaining; and the said defendant being so possessed of his said farm, and having occasion to use the said way, did, with his servants and horses, and mares and geldings, with carts, waggons, and carriages, at the said several times when, &c., pass and repass, in, by, through, and along the said way from the said farm of the said defendant, unto, into, through, over, and along the said part of the said close, called the *Bottom*, and from and out of the said close, called the *Bottom*, unto, into, through, over, and along the said part of the said close, called the *Clays*, and from and out of the said close, called the *Clays*, into, through, over, and along the said other lands, towards

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the river *Wellam* aforesaid, and from thence back again, unto, into, through, over, and along the said part of the said close, called the *Clays*, and from and out of the said close, called the *Clays*, unto, into, through, over, and along the said part of the said close, called the *Bottom*, and from and out of the said close, called the *Bottom*, unto and into the said farm of the said defendant, using the said way there for the purposes and on the occasion aforesaid, as he lawfully might for the cause aforesaid; and in so doing he, the said defendant, with his feet in walking, and with the feet of horses, mares, and geldings, and the wheels of carts, waggons, and carriages, unavoidably a little trod down, trampled upon, consumed, crushed, damaged, and spoiled the grass and herbage then growing and being in the said closes in which, &c., and subverted, damaged, and spoiled the soil of the same closes; and because the said gates, in the said declaration mentioned, before the said several times when, &c., had been wrongfully locked, fastened, and closed, and were then standing and being so locked, fastened, and closed, in and across the said way, and obstructing the same, so that without a little forcing and breaking open, breaking to pieces, damaging, and spoiling the said gates, and the locks, staples, and hinges thereof, and carrying away the materials thereof, and a little damaging the hedges and fences in which the said gates were fixed, the said defendant could not then by himself and servants, and with the said horses, mares, geldings, carts, waggons, and other carriages, pass and re-pass along, and use the said way there, as he ought to have done; the said defendant, at the said several times when, &c., in order to remove the said obstruction, forced, broke open, and a little broke to pieces, damaged, and spoiled the said gates, in the said declaration mentioned, and the locks, staples, and hinges thereof, broke, damaged, and spoiled, and took and carried the materials aforesaid to a small and convenient distance, and there left the same for the use of the said plaintiff, doing no unnecessary damage to the said plaintiff on those occasions, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against him the said defendant; and this he the said defendant is ready to verify; wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

The third plea was in all respects similar to the second, except that it claimed a right for *forty* years instead of twenty years.

Replication.—To the first plea, *similiter*; and the said plaintiff, as to the said plea of the said defendant by him, *secondly*, above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, saith, that true it is that the said defendant, before and at the several times when, &c., was and still is the lawful occupier of the said farm, called *Saint Lambert's Farm*, contiguous and next adjoining to the said close, called the *Bottom*; yet the said plaintiff saith, that the occupiers for the time being of the said farm of the said defendant, for and during the full period of twenty years and upwards, next before the first of the said several times when, &c., and from the commencement of the said period hitherto, have not, as of right, had and used and been accustomed to have and use without interruption, and the said defendant, at the said several times when, &c., of right ought not to have had and used, nor still, of right, ought to have and use a certain way for himself and themselves, and his and

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their servants, to pass and repass on foot, and with horses, mares, geldings, and with carts, waggons, and carriages, to pass and repass from the said farm, in the occupation of defendant, unto, into, through, over, and along a certain part of the said close of the said plaintiff, called the *Bottom*, in which, &c., and so from the said close, called the *Bottom*, unto, into, through, over, and along a certain part of the said close, called the *Clays*, in which, &c., and from the said close, called the *Clays*, into, through, over, and along certain other lands, towards the river *Wellam*, in the county aforesaid, and so from thence back again, into, through, over, and along the said part of the said close, called the *Clays*, and from and out of the said close, called the *Clays*, unto, into, through, over, and along the said close, called the *Bottom*, and from and out of the said close, called the *Bottom*, unto and into the said farm so occupied by the said defendant, at all times of the year, at his and their free will and pleasure, as to the said farm of the said defendant, with the appurtenances belonging and appertaining, in manner and form as in the said second plea alleged, but, on the contrary thereof, he the said plaintiff saith, that the occupier for the time being of the said farm of the said defendant, for and during a long space of time, to wit, for and during the said full period of twenty years and upwards, next before the first of the said several times when, &c., when and as they have from time to time had and used the said supposed way for themselves and their servants to pass and repass on foot and with horses, mares, geldings, and with carts, waggons, and carriages, in, by, through, and along the said supposed way, did so from time to time have and use the same supposed way, by the leave, licence, sufferance, and permission of the occupiers for the time being of the said two closes of the said plaintiff, called the *Clays* and the *Bottom*, to the occupier for the time being of the said farm of the said defendant, from time to time first given and granted in that behalf. And this he, the said defendant, was ready to verify, &c.

And the said plaintiff, as to the said plea of the said defendant by him, *thirdly*, above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, saith, that the occupiers for the time being of the said farm of the said defendant, for and during the full period of forty years and upwards, next before the first of the said several times when, &c., and from the commencement of the said period hitherto, have not, as of right, had and used, nor have been accustomed to have and use without interruption; and the said defendant, or such occupiers, at the several times when, &c., ought not, of right, to have had and used, nor still, of right, ought to have and use, a certain way for himself and themselves, and his and their servants to pass and repass, on foot and with horses, &c.; traversing the plea *modo et formâ*, and concluding to the country.

Rejoinder.—To the replication to the second plea; that the occupiers for the time being of the said farm of the said defendant, in the said second plea mentioned, did not have or use the said way, in the said replication to the said second plea mentioned, by such leave, licence, sufferance, or permission as in the said replication to the said second plea alleged.—Conclusion to the country, and issue joined thereon.

To the replication to the third plea, *similiter*.

At the trial, before *Gaselee, J.*, at the last *Lincoln* assizes, it was in evidence, that within twenty years before the commencement of the action, appli-

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cations had been made by the occupiers of the defendant's close, to the plaintiff, for permission to pass over the road in question, and that parol leave had been given, upon the payment of a small sum as an acknowledgment of the plaintiff's right. The learned judge told the jury, that if they were satisfied that leave had been asked, and the acknowledgments paid, in the manner stated, that then the plaintiff was entitled to recover on all the issues, inasmuch as it shewed that the road had not been enjoyed as a matter of right, without interruption. The jury found for the plaintiff, on all the issues, damages *one farthing*.

Goulburn, Serjt., obtained a rule *nisi* for a new trial, upon the ground that the verdict was against evidence, and for misdirection by the learned judge. He objected, that under the issue raised on the third plea, the evidence of the user of the road by the permission of the plaintiff, was inadmissible, inasmuch as sec. 5 of stat. 3 & 4 W. 4, c. 71, required that such an answer should be specially pleaded.

Adams, Serjt., and *Humfrey* shewed cause.—The evidence was properly received. The *fifth* section of the statute is not applicable to this case, for the evidence which was given was not inconsistent with the simple fact of enjoyment by the defendant. In *Monmouthshire Canal Co. v. Harford* (b), the pleadings on the fourteenth issue were similar to these, except that it arose on a claim of enjoyment for twenty years, and it was there held, that the party was bound to shew an uninterrupted enjoyment, as of right, during the whole period of twenty years, and that the plaintiffs might prove applications made to them for leave to use the road, without specially replying such licence under the *fifth* section of the statute. *Parke*, B., said, "The question on this issue is, whether the occupiers of the closes have had the use and enjoyment of them for twenty years, as of right, and without interruption. They must, therefore, shew the simple fact of uninterrupted enjoyment, 'as of right,' for the full period of twenty years. Any interruption of that enjoyment, as, for instance, enjoyment for alternate weeks only, would be evidence to disprove the plea. If leave was asked on every occasion, the enjoyment, 'as of right,' by the occupier, is at an end, as is its continuity. In *Bright v. Walker*, 4 Tyr. 502, it was held, that in order to establish a right of way within sec. 2 of 2 & 3 W. 4, c. 71, it must be proved that the claimant had enjoyed it for the period of twenty years, 'and as of right;' and that it may be defeated by proof of a grant or licence, written or parol, for a limited period comprising the whole or part of the twenty years." Therefore, this authority is conclusive to shew that the evidence was properly received. The *fifth* section requires, that if the other party shall intend to rely on "any proviso, agreement, or other matter hereinbefore mentioned," it shall be specially pleaded; but those words have reference to any consent or agreement which might be made by deed or writing, as set forth in the *second* section. And it would be inconsistent if, upon this evidence, a verdict were entered for the plaintiff on the second issue, and for the defendant on the third.

Crowder, *amicus curiæ*, mentioned, that a similar question to the present

(b) 5 Tyrwhitt, 68; 1 Cr., M., & Roscoe, 614.

had been raised in *Tichle v. Brown*, in the King's Bench, and that it had been reserved for further consideration (c).

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Goulburn, Serjt., and *Amos*, in support of the rule.—The statute was passed for the purpose of getting rid of such loose and untangible evidence as was received in this case; and the object of the *fifth* section was to compel the party relying on such evidence to plead it specially. The words "actually enjoyed by any persons claiming right thereto, without interruption," which are used in the *second* section, have reference to a claim by any suit or action, as mentioned in the *fourth* section. [*Tindal*, C. J.—The evidence is set up to negative the allegation in the plea.] The term *actually* enjoyed, means the simple fact of enjoyment, without any claim by any action or suit. Suppose an enjoyment without evidence of permission for twenty years, as in this case, and then a permission granted, such permission could only affect the former period, as being evidence of an original permission, which must be proved to be by deed or writing. As the case is put on the other side, if there were a parol permission at the commencement of the forty years, then there would be no claiming as of right. But the meaning of the expression "of right," means of right, as constituted by the act, and does not necessarily mean under a claim of title. In *Bright v. Walker* (d), the defendant pleaded the general issue, and the plaintiff was bound to prove the declaration, and that was an action on the case, and not an action of trespass. The opinions expressed by the judges in *Monmouth Canal Company v. Harford* (e) were given during the argument of counsel, and the judgment of the Court was finally given on another point.

Cur. adv. vult.

TINDAL, C. J.—(After stating the pleadings in the cause.) The question comes before us on a motion to set aside the verdict, as well upon the ground of misdirection, as also that it is against the weight of the evidence. The misdirection complained of is, that the learned judge, upon the issue raised on the last plea, directed the jury to find a verdict for the plaintiff, if they believed the evidence that a former occupier of the defendant's farm had applied for and obtained leave to use the way in question, and that he had paid an acknowledgment for such user; it being contended, on the part of the defendant, that if such evidence was admissible at all under the fifth section of the stat. 2 & 3 W. 4, c. 71, at all events it was not admissible under a traverse of the user for forty years, but that the plaintiff ought to have replied that the way was used by leave and license, as he had done to the plea which claims the way for twenty years. This objection, on the part of the defendant, rests on the fifth section of the act above referred to, by which it is enacted, "that if the other party intends to rely on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." The question, therefore, turns upon the construction and meaning of this clause, whether by the expression that any matter must be pleaded, which is "not inconsistent with the simple fact of enjoyment," the legislature intended to compel the plaintiff to reply, in all cases, the special facts and circumstances,

(c) This case is now reported, 1 Har. & Woll. 769.

(d) 1 Cr. M. & R. 211.
(e) 1 Cr. M. & R. 614.

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which show the way was not used under a claim of right, or whether it only meant to compel the plaintiff to reply all collateral matters, which may defeat the right of way. And whatever might have been our opinion, if the matter had been *res integra*, we think the interpretation which has been put upon this clause by the Court of King's Bench, in the recent case of *Tickell v. Brown* (a), may be held to be the construction to be put upon the statute, and according to that construction, we hold that under a plea denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time, as that it was used by stealth, or in the absence of the occupier of the close, and without his knowledge, or that it was merely a precarious enjoyment by leave and license, or any other circumstances which negative that it is an user or enjoyment under a claim of right; the words of the fifth section "not inconsistent with the simple fact of enjoyment," being referable, as we understand the statute, to the fact of enjoyment as before stated in the act, viz. an enjoyment claimed and exercised "as of right." The case of the *Monmouthshire Canal Company v. Harford and others*, in the Court of Exchequer, is another authority for the same construction of the act. We therefore think the evidence objected to was admissible under the traverse of the last plea; and it would certainly be extremely inconsistent if the defendant should be allowed to insist upon a verdict in his favour for the right of way, when claimed by him as of right, and without interruption, for the last forty years, whilst upon the same record, the plaintiff should be allowed to retain the verdict in his favour upon the issue raised in the second plea, establishing the same way to have been used for the last twenty years, by the leave and license of the plaintiff. Upon the other ground of objection, that the verdict is against evidence, we can only observe, there was evidence on both sides for the consideration of the jury, and we cannot so clearly see that it preponderated in favour of the defendant, as to induce us to disturb the verdict.

Rule discharged.

(a) 1 Har. & Wol. 769.

LYNG v. SUTTON.

April 28th.

Where a cause and all matters in difference are referred by an order at *nisi prius*, an application to set aside the award should be made within the first four days of the term following the award.

MANSEL had obtained a rule *nisi* for the defendant, to set aside an award, upon the ground that the arbitrator had not decided on a chancery suit, which was pending, although it was part of the matter submitted to him.

J. Manning, shewed cause.—This cause, and all matters in difference, were referred to the arbitrator, by an order at *nisi prius*, and he directed a verdict to be entered for the plaintiff for 30*l*. The award was made on the 23rd of December, 1835, and on the 4th of January, the defendant's attorney adopted it, by paying a moiety of the arbitrator's fees. *Hilary* Term commenced on the 11th of January, and this rule was not obtained until the 1st of February, which is too late, as it ought to have been made within the first four days of the term. *Borrowdale v. Hitchener* (a).

(a) 3 Bos. & P. 244; and see *Ravesthorn v. Arnold*, 6 B. & Cress. 629; and *Kennard v. Harris*, 2 B. & Cress. 801.

Mansel, contrà.—If the Court refused to exercise an equitable jurisdiction, the defendant will sustain a hardship.

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TINDAL, C. J.—The application ought to have been made within the first four days of the term.

PARK, J.—I am of the same opinion. I think we ought to be very careful how we relax our rules. Hard cases make bad law.

VAUGHAN, J., and BOSANQUET, J., agreed.

Rule discharged.

HOPPEL v. LEIGH.

April 30th.

THIS was an action of covenant for not repairing premises, and judgment having been suffered to go by default, a writ of inquiry was held before the sheriff, and the damages were assessed at 13*l*. The prothonotary taxed the plaintiff's costs, in pursuance of the reduced scale, which was promulgated by the courts of common law, on the 15th of *March*, 1834.

Where less than 20*l*. was awarded to the plaintiff, on a writ of inquiry in an action of covenant, and the prothonotary taxed the costs according to the lower scale, promulgated 15th *March*, 1834, the Court refused to interfere with the taxation.

Hoggins moved that the prothonotary should be directed to revise his taxation. The rule only refers to "all actions of assumpsit, debt, or covenant, where the sum recovered, or paid into court, and accepted by the plaintiff, in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l*." It is not, therefore, applicable to such a case as the present, and if the rule does not apply, then by the former practice the costs would be allowed on a higher scale.

TINDAL, C. J., after consulting the prothonotary.—We are informed that, since the rule has been promulgated, the practice has been, when less than 20*l*. damages are assessed on a writ of inquiry, to tax the costs according to the lower scale.

The other judges concurred.

Rule refused.

HARRISON v. PAYNE.

May 2nd.

IN this action, the plaintiff had sued the defendant for money had and received to the plaintiff's use; the defendant obtained a rule *nisi*, under the Interpleader Act, upon an affidavit, which stated that he had received a joint authority from the plaintiff and one *Robey*, to collect the rents of certain houses, and that he anticipated if he paid over this money, to recover which this action was brought, he should afterwards be sued by *Robey* for the amount.

Where a defendant obtained a rule under the Interpleader Act, upon a suggestion that a third party claimed the amount in his hands, for which he was sued, and it afterwards appeared, that the defendant had no just expectation

Atcherley, Serjt., shewed cause for the plaintiff, upon an affidavit, which disclosed that the defendant had asked the plaintiff for time to pay the debt upon the security of a bill of exchange.

that he should be sued by the third party, the Court discharged the rule with costs.

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Tulfourd, Serjt., appeared for *Robey*.—The affidavits shewed that *Robey* was originally the lessee of the premises under the plaintiff, but that an authority was given to the plaintiff by *Robey* to recover the money in the hands of the defendant, and that a verbal notice was also given, by *Robey*, to the defendant, before the action was brought, requiring him to pay the plaintiff.

Mansel, in support of the rule, contended that the rents belonged to *Robey*, and had been collected by his authority; and that it appeared on the affidavits that he had refused to give the defendant an authority in writing, to pay the money to the plaintiff.

TINDAL, C. J.—The defendant has received a verbal notice to pay the money to the plaintiff, and he had no just expectation that he would be sued by *Robey*. The rule must be discharged, and with costs.

PARK, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule discharged, with costs.

Foot, demandant, v. SHERIFF, tenant.

May 7th.

Where a *grand cape* was set aside for irregularity, the Court refused to make the rule absolute with costs.

THE tenant had obtained an order in the Court of Chancery to set aside the writ of right, and subsequent proceedings in this cause, for irregularity (a); and a *grand cape* having been issued against the tenant for not appearing to the summons, a rule was obtained to set the *grand cape* aside, for irregularity, with costs.

Bompas, Serjt., shewed cause.—As the former proceedings have been set aside in the Court of Chancery, it is admitted that this rule must be made absolute, except as to the costs. It is not usual to grant costs to either party in real actions, and here the demandant would have been out of court, if he had not issued the *grand cape*, as the tenant did not appear.

Biggs Andrews, *contrà*.—Interlocutory costs are allowed in real actions, and as the irregularity is admitted, the usual rule ought to be observed.

TINDAL, C. J.—The ultimate costs of a real action are not allowed, but the Court will exercise their discretion as to interlocutory costs. The tenant has very properly set the *grand cape* aside, for the purpose of freeing his title, but this is not a case where costs ought to be given.

PARK, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule accordingly.

(a, See *Foot v. Sheriff*, 1 *Hodges*, 412.

SMITH v. GAINSFORD.

May 9th.

ASSUMPSIT to recover 3*l.* 3*s.* for work and labour by the plaintiff, as a domestic servant to the defendant, and on an account stated.

Pleas.—First, to the whole demand, except 2*l.* 2*s.* non-assumpsit. Secondly, as to 2*l.* 2*s.* parcel, &c., a tender. And thirdly, as to 1*l.* 1*s.* parcel, &c., that the plaintiff was engaged as a servant to the defendant, at the yearly wages of 12*l.* 12*s.*; that during the said service she conducted herself so improperly, that the defendant discharged her for misconduct; and that the said sum of 1*l.* 1*s.* accrued due after the plaintiff had been so discharged. The plaintiff took issue on the first and second pleas, and replied *de injuriâ* to the third plea. At the trial, before the under-sheriff of *Middlesex*, it was in evidence, that the plaintiff entered into the service of the defendant, as cook, on the 18th or 19th of *November*, 1835, at the yearly wages of 12*l.* 12*s.*; that she remained in service until the 15th of *January*, when she was sent to prison, under a charge of being concerned in the robbery of some plate, which had been taken away from the defendant's house. On the 20th of *January*, the plaintiff having been brought before a magistrate, was discharged out of custody, and no further proceedings were taken; and on the 22nd of *January*, she returned to the defendant's house, and took away her clothes. A tender of 2*l.* 2*s.* was then made to her in payment of her wages, which she refused, contending that she was entitled to three months' wages. The jury found the first and last issues in favour of the plaintiff, with 1*l.* 1*s.* damages, and the second issue for the defendant.

A domestic servant was hired at twelve guineas a year, and after she had served nearly two months, her mistress sent her to prison, on a charge of felony; she remained in prison until days after the expiration of two months' service, when she returned to her mistress's house, and took away her clothes, the charge of felony not being further prosecuted.—*Held*, that the servant was entitled to three months' wages, and that under an *indebitatus* count for work and labour.

C. Jones moved for a new trial, or to enter a verdict for the defendant on all the issues, upon the ground that the plaintiff was not entitled to recover for the three months' service, and that, at all events, the contract ought to have been specially stated in the declaration.

Byles shewed cause.—The plaintiff is entitled to retain the verdict on these issues. The work and labour was, in fact, actually performed, and the *indebitatus* count is therefore sufficient. In *Gandell v. Pontigny* (a), where a servant was hired by the quarter, and the master discharged him in the middle of a quarter, without a sufficient cause, it was held that the servant was entitled to recover a quarter's wages, under an *indebitatus* count for work and labour. Here the third month's service was entered upon; and the plaintiff was entitled to recover for the whole month, *Collins v. Price* (b). The plaintiff's clothes were not removed until after the commencement of the third month, and the relation of master and servant was then in existence.

Jones in support of the rule, contended that by sending the plaintiff to prison, under a charge of felony, the defendant had adopted the strongest possible mode of discharging her from his service, and that the discharge having taken place before the expiration of the second month, the plaintiff

(a) 4 Camp. N. P. C. 375; S. C. 1 Stark. N. P. 198.

(b) 2 M. & P. 233.

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could have no claim for more than two months' wages. In support of the objection, that the contract ought to have been specially set out in the declaration, he cited *Archard v. Hornor* (c), and *Hulle v. Heightman* (d).

TINDAL, C. J.—It appears to me, that sending the plaintiff to prison, under a charge of felony, was not of itself a dissolution of the contract. The plaintiff's clothes remained at the defendant's house, and she returned to fetch them away, whilst the relation of master and servant still existed; the plaintiff is entitled to recover for the third month's wages.

PARK, J.—I am of the same opinion; the case is precisely within the principle of *Gandell v. Pontigny* (e).

VAUGHAN, J, concurred.

BOSANQUET, J.—The sending the plaintiff to prison was, under the circumstances, as if the defendant had locked her up in his own house.

Rule discharged.

(c) 3 Car. & P. 349.
(d) 2 East, 145.

(e) 4 Camp. N. P. C. 375; 1 Stark. N.P. C. 198.

CROFTS v. PEACH and an^r.

May 9th.

In an action for the infringement of patent, the plaintiff will not be compelled to produce a specimen of the patent articles, to enable the defendant to prepare his defence to the action.

THIS was an action brought against the defendant, for an infringement of the plaintiff's patent for making lace by machinery.

Wightman applied for an order to compel the plaintiff to produce to the defendant a specimen of the patent lace which was produced by the plaintiff's machinery. The 5 & 6 W. 4, c. 83, was passed for the purpose of giving certain privileges to patentees, and by section 5, the defendant is required to give the plaintiff notice of the objections on which he intends to rely at the trial of the action. It may be necessary for the defendants to prove at the trial, that the plaintiff's invention is not new, and unless they are furnished with a specimen of the lace, it will be difficult to obtain the necessary evidence. The specification was not filed until *September*, 1835, so that the article is not commonly known.

TINDAL, C. J.—The effect of this application is to ascertain the evidence which the plaintiff will produce at the trial. The defendants may plead that the invention is not new, if that is the fact. The specification gives the necessary information.

PARK, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule refused.

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DRAIN v. THOMPSON.

April 16th.

THEOBALD moved for leave to enter up judgment on an old warrant of attorney, upon an affidavit which stated that the defendant was seen alive on the 9th of April. He cited *Cockman v. Hellyer* (a).

A motion to enter up judgment on a warrant of attorney, was granted where the defendant was sworn to be alive seven days before the day the motion was made.

Per Curiam.—(PARK, J., and VAUGHAN, J.)—That is sufficient.

Rule granted (b).

(a) 1 Bing. N. C. 3.

(b) See *Watts v. Bury*, 1 Harr. & Woll. 371; *Gray v. Withers*, Ib. 659; *Krell v. Joy*, Ib. 670.

DOE dem. SWINSON v. SINCLAIR and another.

April 16th.

EJECTMENT. The cause was referred to arbitration by an order at *nisi prius*; and, by the terms of the reference, the arbitrator was to be at liberty, if he thought the lessor of the plaintiff was entitled to a verdict, to award compensation to the defendants for certain buildings which they had erected upon the premises. The arbitrator, by his award, directed that the verdict which had been entered for the plaintiff should stand, and that the lessor of the plaintiff should pay 20*l.* to the defendant, *W. Sinclair*, or his attorney, and 30*l.* to the other defendant, *H. Sinclair*, or his attorney, as a compensation for the buildings which had been erected. The defendants had appeared in the action by separate attorneys.

An action of ejectment was referred by an order at *nisi prius*, and the arbitrator was empowered to award the defendant a compensation for buildings erected on the premises. The arbitrator ordered a verdict to be entered for the plaintiff, and awarded the defendant a sum of money for buildings. Held, that this sum of money might be set-off by the plaintiff against the costs which the defendant was liable to pay him, but that it was subject, under Reg. 93 Hil. T. 2 W. 4, to the defendants' attorneys' lien for his costs.

Barstow obtained a rule *nisi*, calling upon the defendants to shew cause why the said sums of 30*l.* and 20*l.* should not be set-off, by the lessor of the plaintiff, in part liquidation of the costs of the action, to which he was entitled under the award, and which costs were taxed at 250*l.*

Humfrey and *Heaton* shewed cause upon affidavits made by the defendants' respective attorneys, which stated, that the defendants were respectively indebted to them for costs in the action beyond the said sums of 30*l.* and 20*l.*—By Reg. Gen. Hil. T. 2 W. 4, No. 93, "No set-off of damages or costs between parties, shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought." These sums which are awarded are in the nature of damages, and there can be no doubt but that the attorneys would have had a lien upon them if they had passed through their hands. In *Watson v. Masckall* (a) this Court acted in the spirit of the rule of court by extending the attorney's lien to his costs, as taxed between attorney and client; and the lessor of the plaintiff must pay these sums before he could obtain the possession of the premises, and, consequently, before the amount of the costs could be ascertained.

(a) 1 Hodges, 73; S. C. 1 Scott, 286.

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G. T. White, contrd.—In *Newton v. Newton* (*b*), where it was agreed by an order of *nisi prius* that a verdict should be entered for the plaintiff for nominal damages and costs, in an action of libel, and that the plaintiff should pay the defendant 70*l.*, which was due to her, the Court permitted the 70*l.* to be set off against the costs in the cause. The rule of court is not applicable to this case. That is determined by *George v. Elston* (*c*), where the Court held that the rule is only applicable to the set-off of damages or costs in other suits. There, in an action of trespass, a verdict was found against one defendant, and in favour of another; and it was held, that the costs might be set off, notwithstanding the effect of it would be to deprive the attorney of his lien. *Figes v. Adams* (*d*) and *Howell v. Harding* (*e*) are to the like effect. Nor was the payment of the money a condition precedent to the delivery of the possession of the premises. In *Doe v. Carter* (*f*) it was decided, that interlocutory costs might be set off against final costs, where the payment of them is not strictly a condition precedent.

TINDAL, C. J.—This rule must be made absolute, but *sub modo* only, as it must be subject to the attorneys' lien for their costs. The first question is, whether these sums are properly the subject of a set-off against costs, as the rule must otherwise fall to the ground; and it seems to me that *Newton v. Newton* (*b*) is in point to shew that they may be so treated. The money is awarded in the nature of damages; and the rule of court is, that no set-off of damages, shall be allowed to the prejudice of the attorneys' lien for costs. If, therefore, it is once shewn that these sums of money were awarded in the nature of damages, and that they may be the subject of set-off against the plaintiff's costs, then this rule requires that the set-off shall not be allowed to the prejudice of the attorneys' lien for their costs; and the justice and equity of the case accords with this view of the question.

The other judges concurred.

Rule absolute; subject to the lien of the defendants' attorneys for their costs.

(*b*) 1 M. & Scott, 366.

(*c*) 1 Hodges, 63.

(*d*) 4 Taunt. 633.

(*e*) 8 East, 362.

(*f*) 8 Bing. 330.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term, 1836.

SHARP v. HAWKER.

June 7th.

HUMFREY obtained a rule *nisi* against the plaintiff's attorney, requiring him to shew cause why he should not pay over a sum of money to the plaintiff which he had received from the defendant, with the costs of the application. The action was brought in this court.

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In an action, brought in the Court of C. P. the plaintiff obtained a rule against his attorney, requiring him to pay over money he had received from the defendant. It appearing that the attorney was not an attorney of the C. P. the rule was discharged for want of jurisdiction.

Whitmore shewed cause. There is a preliminary objection to this application; the plaintiff does not shew that the attorney is an attorney of this court. It has been held, that when an application is made against an attorney, it must appear upon the affidavit that he is an attorney of the court. *In re Becke* (a); *Ex parte Lord* (b). My affidavit shews that he never was admitted an attorney of this court.

Humfrey, contrd.—In the two cases which are cited, applications were made to punish the attorney for misconduct. Here the plaintiff only seeks to recover money, which has been received in the action brought in this court. That gives the Court jurisdiction. If this application were made to the court where the attorney is admitted, it would then be said that as the cause was in this court, so is the remedy also.

Butt, amicus curiæ, mentioned that *In re Greaves*, (c) where an undertaking had been given by an attorney of the King's Bench, in an action brought in this Court, the Court of King's Bench entertained an application which was made in consequence of the non-performance of the undertaking.

(a) 1 Har. & Woll. 417.

(c) 1 Cr. & J. 374, n.

(b) 1 Hodges, 195.

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".

HAWKER.

TINDAL, C. J.—We have no jurisdiction to interfere. What authority have we to proceed against an attorney who is not an officer of this court? The rule must be discharged.

GASLEE, J.—The attorney is responsible to the Court where he is enrolled.

PARK, J., and VAUGHAN, J., concurred.

Rule discharged.

June 7th.

SMITH v. JACOBS.

When a defendant in custody on final process gives a cognovit, the rule Hil. T. 2 W. 4, No. 72, which requires the presence of the debtor's attorney, is not applicable.

HUMFREY obtained a rule nisi to discharge the defendant out of custody, on the ground that he had been taken in execution on a cognovit which he had executed whilst in the Fleet Prison, without having his attorney present.

Miller shewed cause. The defendant was in custody in the Fleet Prison, on a judgment which the plaintiff had recovered against him. The rule of court, 2 W. 4, Hil. T. No. 72, which requires the presence of the debtor's attorney, is only applicable to cognovits "given by any person in custody of a sheriff, or other officer, upon *mesne process*." Here the defendant was in custody on final process.

Humfrey was stopped.

Per Curiam.—The rule of court is not applicable to this case.

Rule discharged.

June 7th.

NORTON v. LORD MELBOURNE.

Upon an application for a commission to examine a witness who is out of the jurisdiction of the Court, under 1 W. 4, c. 22, it is not necessary to shew the nature of the attempts which have been made to obtain his attendance; and a commission will be issued in an action for crim. con. as in other cases.

J. BAYLEY obtained a rule nisi under the Interrogatories Act, 1 W. 4, c. 22, for a commission to examine a witness, in an action for crim. con. which was pending in this court. The affidavit in support of the application stated, that one *William Mansell*, a servant to the Earl of *Mulgrave*, then at the Castle in *Dublin*, was a material and necessary witness; that the plaintiff could not safely proceed to trial without his evidence; and that it was believed that he would not be within the jurisdiction of this court before or at the trial of the cause.

The *Attorney-General* shewed cause. This action is in the nature of a criminal charge, and it may be of the utmost importance, in such a case, that all the witnesses should be examined *viva voce*. The stat. 45 G. 3, c. 92, which was passed for the purpose of enforcing the attendance of a witness, to give evidence in criminal prosecutions in any part of the United Kingdom, shews the strong desire of the legislature that, in all criminal cases, the witnesses should appear in court. This affidavit does not state the nature of the attempt

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which has been made to procure the attendance of the witness, or even whether *any* application has been made to him. For any thing which appears to the contrary, the witness might have been sent to *Dublin* for the express purpose of avoiding the service of a subpoena. The statute gives a discretion to the Court; and it might be a dangerous precedent to grant a commission in a case of this description, upon an affidavit which is so vague and unsatisfactory.

TINDAL, C. J.—This affidavit is in the usual form, and I should feel some difficulty in drawing a distinction between an action brought for criminal conversation and any other action. If the witness should appear at the trial, or come within the jurisdiction of the Court in the meantime, then he might be examined *visa voce*, notwithstanding the commission. The rule must be made absolute.

PARK, J.—This affidavit is quite sufficient.

GASELEE, J. concurred.

VAUGHAN, J.—The object of the statute was to obviate the difficulty which arose from the want of power to obtain the evidence of witnesses who were out of the jurisdiction of the Court. The 4th section only requires that the witness should be out of the jurisdiction of the Court. If this witness had been applied to, and he had promised to attend the trial, the plaintiff has no power to enforce his attendance.

Rule absolute.

WOOD v. HURD.

June 3rd.

THE damages and costs in this cause, to the amount of 3,793*l.*, having been paid by the defendant, the plaintiff's attorney consented that a judge's order should be made, in order that satisfaction might be entered upon the roll. A judge's order to that effect had accordingly been drawn up, but the Secondary refused to enter satisfaction without the production of a warrant of attorney from the plaintiff.

A consent given by the plaintiff's attorney, that a judge's order shall be made to enter satisfaction on the judgment roll for the damages and costs in a suit, does not dispense with a warrant of attorney from the plaintiff.

Butt contended that under these circumstances the warrant of attorney was unnecessary, as the consent of the plaintiff's attorney was sufficient.

TINDAL, C. J.—It is the invariable course to produce a warrant of attorney, and it is necessary in order to get rid of so solemn a thing as a judgment of the Court. The production of it affords the only security that the judgment has been satisfied; for the plaintiff's attorney may no longer be an officer of the court, and in some cases he may be in league with the defendant.

PARK, J., concurred.

GASELEE, J.—It is upon seeing a warrant of attorney that the judge's order is usually made.

Rule refused.

May 27th.

CAMPION v. COLVIN and others.

An owner, who remains in possession of a ship, has a lien on the goods on board belonging to the charterer, but directed in the bills of lading to be delivered to a consignee, for the freight due under the charter-party.

THIS was a feigned issue from the Court of Chancery. The issue recited that "511 bales of cotton wool, consigned to the defendants, had been carried in a vessel called the *Hero*, whereof the said plaintiff was an owner, from *Calcutta* to *London*;" and the issue was to try "whether the said plaintiff and his co-owners then had a lien upon the said cotton wool for freight, beyond the amount of freight payable in respect of the carriage of the said cotton wool." The jury found for the plaintiff, subject to the opinion of the Court on the following

CASE.

On the 18th of *November*, 1816, a charter-party was entered into between the plaintiff and one *John B. Gooch*, then a merchant in *London*, for a voyage from *London* to *Madeira*, *Madras*, and *Calcutta*, and back to *London*; which charter-party was to the following effect:—This charter-party of affreightment between *John Campion*, owner of the ship *Hero*, whereof *John Price* is commander, of the one part, and *John B. Gooch*, of the other part, witnessed that the said owner did thereby covenant that the said ship, being then tight, staunch, and sufficiently manned with 24 men and boys, and every way properly fitted, the said commander, or some other proper person in his stead, should immediately take on board the said ship, from the said freighter, all such lawful goods as he might think fit to load, reserving sufficient room in the fore-castle and half-deck for the stowage of her provisions and cables: and having received the same on board the said ship, should immediately proceed to the island of *Madeira*, where, being arrived, and ready to receive goods on board, the said commander should give immediate notice thereof, in writing, to the agents or assigns of the said freighter there, and receive and take on board the said ship, from the said agents or assigns, all such other lawful goods as they should think fit to load; and having received the same on board the said ship, should immediately proceed direct to *Madras* and *Calcutta*, and there deliver her cargo. A similar provision followed, for loading goods at *Madras* and *Calcutta*, with the cargo there to be shipped by the freighter or his agent, to *London*. And further, that a supercargo, to be appointed by the said freighter, should be conveyed in the said ship during the whole of the said voyage, both out and home, and should be found and provided with the ship's provisions. In consideration whereof, and of everything above-mentioned, the freighter covenanted to pay to the owner, for the freight or hire of the said ship for the aforesaid voyage, at the rate of 14*l.*, sterling money of *Great Britain*, per ton, upon each and every ton of the said ship's registered tonnage, together with 2*l.* 10*s.* of like money per cent. prime on the amount of the freight, and in lieu of all port and pilotage charges. And that the said freight and prime should be paid as follows, viz.: 500*l.*, part thereof, in cash, at the expiration of six months from the day of the date of the said charter-party; one moiety of the remainder thereof to be paid by bills, payable in *London*, at two months after date from the day on which the said ship should arrive in the *Thames* on her return from the said voyage; and the resi-

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due thereof to be paid by bills, payable in *London*, at four months' date from the same period. And the freighter did thereby agree, at his own costs, to defray the expenses that might be incurred in making any alteration in the interior of the ship during the time she should be employed in his service. The usual stipulation as to demurrage was also inserted. It was thereby also mutually agreed between the said parties, that, notwithstanding the appointment of the said *John Price* to the command of the ship, the said freighter should have liberty to appoint *James Gooch Thompson* to proceed out and home, and not only to act as supercargo, but to take upon him the authority of the said *John Price* in the stowage of the said cargoes, and which should be done under the sole and entire direction of the said *J. G. Thompson*; but that he should not, in any other matter or particular whatsoever, interfere with the duties of the said *John Price* as commander of the said ship.

The said defendants and Messrs. *Colvin* and Co., at the time of the sailing of the vessel, and of her arrival at *Calcutta*, were cognizant of the said charter-party. The ship sailed with a cargo of merchandise belonging to the said *Gooch* on board, and the said cargo was invoiced at the sum of 11,422*l.* 14*s.* Messrs. *Bazett*, *Farquhar*, *Crawford*, and Co., of *London*, of which firm the defendants are the surviving partners, advanced to the said *Gooch* large sums of money to enable him to purchase his outward cargo, and the same was consigned by the said *Gooch* to *Colvin* and Co., then merchants at *Calcutta*, as his agents, and was by the said *Colvin* and Co. received from the said ship at *Calcutta*, who disposed of the same on account of the said *Gooch*, the said *Colvin* and Co., of *Calcutta*, being at the same time the general agents of the defendants, and the defendant, *David Colvin*, being at the time of the making of the charter-party, and arrival of the ship in *London*, partner as well in the house of *Bazett* and Co., of *London*, as of *Colvin* and Co., of *Calcutta*.

Colvin and Co., according to the direction of the said *Gooch*, put up the ship as a general ship at *Calcutta*, and obtained several shipments on freight; but not being able to fill the ship, they purchased the 511 bales of cotton wool in the issue mentioned, with advances made by them on account of the said *Gooch*, they (*Colvin* and Co.) having the outward cargo at that time in their possession. *Price*, the master of the ship, signed a bill of lading for these and other goods which were shipped. It stated that the goods were to be delivered in *London* "to *Bazett* and Co., or to their assigns: freight for the said goods paid by bills on *London*." It was left to the jury, whether these cotton wools were the goods of the said *Gooch*, and they found that they were the goods of *Gooch*, which is to be taken as a fact in this case.

On the arrival of the vessel in *London*, the cargo was deposited in the warehouses of the *East India* Company, and the proper notices were given by the plaintiff to preserve his lien under the statute.

Before the arrival of the ship at *London*, *Gooch* stopped payment, and afterwards became a bankrupt. For the goods shipped on freight, the plaintiff received the amount of such freight, and also a sum equal to the current rate of freight of the 511 bales of cotton wool, leaving a considerable sum of money due according to the charter-party. The cotton wool was sold by the *East India* Company, and the freight due for the same was paid by them to the plaintiff; but adverse claims were put in by the plaintiff and the defendants, to the residue of the money produced by the sale, the defendants claiming the same under the bill of lading as consignees thereof, and the plaintiff claiming a

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lien thereon for the sum due to him by the said *Goock* on the charter-party. The *East India Company* thereupon filed their bill of interpleader in Chancery, in which suit this issue is sent.

The question for the opinion of the Court is—Whether the plaintiff had a lien on the cotton wool for freight, beyond the freight due in respect of the carriage of the cotton wool upon the said voyage? If the plaintiff had such a lien, the verdict to stand; but if the Court shall be of a contrary opinion, the verdict to be entered for the defendants.

Creswell, for the plaintiff.—This identical charter-party has already been brought before the Court of King's Bench, upon a similar question to the present, and it was held that the possession of the ship continued in the owner, and that he therefore had a lien upon the cargo for his freight. *Saville v. Campion* (a). That decision was confirmed by *Christie v. Lewis* (b). In *Faith v. East India Company* (c), another case between these parties, it was decided, that where goods were put on board on the homeward voyage, and consigned to the agents of the consignor, although in fact the goods belonged to the charterer, the shipowner had nevertheless a lien upon the goods. In the present case, it is expressly stated that the goods belonged to *Goock*. These two cases are therefore decisive in favour of the plaintiff. *Newberry v. Colvin* (d) may be cited on the other side; but that case does not overrule the former decisions, even by implication.

Taddy, Serjt. *contrà*.—*Saville v. Campion* (a) ought to be re-considered; because it was decided contrary to *Hutton v. Bragg* (f); and in *Christie v. Lewis* (b), the Court differed in opinion. In *Saville v. Campion*, *Abbot*, C. J., in delivering judgment, very carefully pointed out that the decision was applicable as between the parties to the suit; but in the present case, the rights of a third party intervene, who claims the goods as the consignee. As to *Faith v. The East India Company* (c), it is very true that the action was brought between the same parties; but the stipulations in that charter-party were very different. There the freight was to be payable on the delivery of the whole of the cargo. [*Tindal*, C. J.—So here the bills for the freight of the ship were to be given before the cargo was delivered.] That does not expressly appear. In order to give a shipowner a right of lien for freight, an express contract that the payment is to precede the delivery ought to appear; but such a stipulation cannot be implied. *Birley v. Gladstone* (i); *Gladstone v. Birley* (j); *Tate v. Meek* (k); *Yates v. Railstone* (l). And the captain, who was the plaintiff's agent, by signing the bill of lading and accepting the freight, renounced any right of lien which might have attached.

Creswell, in reply, was stopped by the Court.

TINDAL, C. J.—I am unable to come to a different conclusion from that at which the Court arrived in *Saville v. Campion* (a), and *Tate v. Meek* (k), namely, that an owner, who remains in possession of a ship, has a lien on the

(a) 2 B. & Ald. 503.
 (b) 2 Brod. & Bing. 410.
 (c) 4 B. and Ald. 630.
 (d) 7 Bing. 190.
 (f) 2 Marsh. 339.

(i) 3 M. & S. 205.
 (j) 2 Merivale, 410.
 (k) 8 Taunt. 280; S. C. 2 B. Moore, 278.
 (l) 8 Taunt. 293.

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goods of the charterer, for the hire due under the charter-party. It has been attempted to distinguish this case from those decisions in two particulars. First, it is said, that the charter-party is not so framed, that the shipowner remained in possession of the ship; and, secondly, that the owner is only entitled to enforce his lien, when the payment of the freight is concurrent with, or precedent to, the delivery of the goods.

The main reliance is placed on the first objection, and *Newberry v. Colvin* (a) has been cited; but that case is distinguishable from the present. I am not able to see that this differs from an ordinary charter-party; the owners covenant that the ship shall take certain goods on board, and perform a certain voyage: there is no demise of the ship, as was the case in *Newberry v. Colvin* (a), where the owner parted with the possession of the ship, and the charterer took her into his service, and agreed to pay a certain sum for the use and hire of her.

As to the second point, on looking at the charter-party, it appears that the shipowner intended that the two bills for the amount of the freight, should be given before the goods were taken out of the ship. The freight was to be calculated by the register tonnage, and 500*l.*, part thereof, was to be paid at the expiration of six months from the date of the charter-party, and the remainder by two bills; one at two months, and another at four months after date, from the day on which the ship should arrive from her homeward voyage. Now, by looking at another part of the charter-party, which stipulated that the ship should take her regular turn in the docks for the purpose of delivering her cargo, it appears that bills must have been necessarily given anterior to the delivery of the cargo.

Then it is said, that this case is distinguishable from *Saville v. Champion* (b); because the interest of a third party is now before the Court, namely, the consignee of goods under a bill of lading, signed by the captain. Let us see if that is a real distinction. In the first place, the outward-bound cargo was consigned to *Colvin* and Co. in *Calcutta*; secondly, the 511 bales of cotton wool were purchased by them with advances made on account of the charterer, they then having the outward cargo in their possession; and, thirdly, these goods are found to be the property of the charterer.

It would be varying the real intent of the parties, if we were to hold that these goods were not subject to the lien; because they are found to be the property of the charterer, and no other person is shewn to have had an actual interest distinct from him. I am therefore of opinion, that this is not distinguishable from the former cases, and the verdict must be entered for the plaintiff.

PARK, J.—*Saville v. Champion* (b) does not differ materially from this case. Here the bills for the freight must necessarily have been given before the goods were delivered.

GASELEE, J.—I am of the same opinion. The defendants cannot be considered as third parties in the transaction, any more than the assignees of the charterer who now stand in his place.

(a) 7 Bing. 190.

(b) 2 B. & A. 503.

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VAUGHAN, J.—I am of the same opinion. *Saville v. Campion* (a) was rightly decided, and upon mature consideration. It is admitted that if that case cannot be shaken, the plaintiff is entitled to recover.

Verdict for plaintiff.

(a) 2 B. & A. 503.

GROCCERS' COMPANY v. DONNE, Clerk to the Commissioners of Sewers of the City of London.

June 1st

In an action against the commissioners of sewers, the declaration alleged that they unskilfully, wrongfully, and improperly cut a sewer near to an ancient messuage of the plaintiffs, so that it was injured and weakened; and the cause being referred at *Nisi Prius*, the arbitrator found in his award; that there were two modes of making a sewer, the one by tunnelling, the other by open cutting; that a deep sewer could not be made in the street where the plaintiff's house was, by either method, without risk of doing damage to the buildings. That the sewer in question was made by tunnelling; but that the probability of damage accruing was in some degree less where it was made by open cutting. That the commissioners, in causing the sewer to be made, were acting *bonâ fide*, and that the sewer was fit and proper for convenient drainage, and was made in a skilful and proper manner in all respects:—*Held*, that upon this state of facts, the commissioners were not liable to pay damages for the injury caused to the messuage.

THE declaration stated, that whereas before and at the time of the committing of the grievances thereafter mentioned, the plaintiffs were lawfully possessed of and in a certain ancient messuage and premises, situate, &c. Yet the said Commissioners of Sewers of the City of London and Liberties thereof, well knowing the premises, but wrongfully and injuriously intending to injure the plaintiffs, did make, cut, and dig a certain shaft, sewer, gutter, and ditch, near unto the said ancient messuage and premises so in possession of the plaintiffs as aforesaid, and did unskilfully, wrongfully, and improperly, make, cut, and dig the said shaft, sewer, gutter, and ditch, so being near unto the said ancient messuage and premises of the plaintiffs as aforesaid; and did also make, cut, and dig the said shaft, gutter, sewer, and ditch, without shoring up, propping, or duly securing the said messuage and premises, or the earth and sub-soil supporting the walls of the said ancient messuage and premises of the plaintiffs as aforesaid, in order to prevent the same from being injured by the said making, cutting, and digging of the said shaft, sewer, gutter, and ditch, as aforesaid, and without giving due notice to the plaintiffs of the intention of them the said commissioners to dig, make, and cut the said shaft, sewer, gutter, and ditch, so as to enable the plaintiffs to shore and prop up their said ancient messuage and premises; by means of which several premises, the said ancient messuage and premises of the plaintiffs, became and were and still are greatly injured and weakened, and the walls, partitions, ceilings, floors, and other parts of the said ancient messuage and premises of the plaintiffs have been broken, cracked, and fallen down, and become injured, so that the said messuage of plaintiffs had become and was dangerous to live and reside in. And the said plaintiffs, from the time of committing the aforesaid grievances, hitherto had been and were hindered and prevented from enjoying their said ancient messuage and premises in so ample and beneficial a manner as they might and otherwise would and ought to have done; and the plaintiffs have been obliged to expend divers sums of money, amounting to the sum of 500*l.* in and about the obtaining another residence, and in and about removing divers articles of furniture and other goods and chattels from and out of their said ancient messuage; and by means of which said several premises, the said messuage and premises had been and were much injured and lessened in value, and thereby the same had become and were of no use or value to the said plaintiffs; and the said plaintiffs, by means of the premises, were injured and damified to a large amount, to wit, &c. *Plea*—Not guilty; and issue joined.

The cause came on for trial before *Tindal, C. J.*, at the sittings after *Trinity Term, 1835*, when a verdict was entered for the plaintiffs, by consent and order of *Nisi Prius*, subject to the award of a barrister, who was empowered to state any special fact in his award, or raise thereon any point of law for the opinion of the Court.

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The award, after reciting the order of *Nisi Prius*, proceeded as follows :—
“Now, therefore, I the said arbitrator, having heard the allegations and proofs, do make my award in manner following ; that is to say, I find that the defendant is clerk to the Commissioners of Sewers of the City of *London*, and that a deep sewer was lately made by order and under the directions of the said commissioners in *Prince's Street*, in the said city, and within the jurisdiction of the said commissioners, near to the dwelling-house of the plaintiffs, in the declaration in this cause mentioned. I find that *Prince's Street* is a narrow street, and that there are in most parts of it heavy buildings on one or other of the sides, and in some places, on both sides of the street, one of which is the said house of the plaintiffs. I find further, that there are two modes of making a sewer practised in the city of *London*, the one by what is called tunnelling, and the other by what is called ‘open cutting.’ I find that, in *Prince's Street*, as in most other narrow streets, with heavy buildings adjoining on them, a deep sewer could not be made, either by the one method or the other, without risk of damage to the adjoining buildings. I find that the amount of risk varies according to the nature of the soil, and that the soil of *Prince's Street* is of a kind to make the risk considerable, and that the nature of the soil was known or might by due inquiry and proper experiments have been known to the said commissioners, before the making of the sewer. I find further, that the probability of damage occurring is in some degree less, where the sewer is made by open cutting, than by tunnelling. I find further, that the sewer in this case was made by the mode of tunnelling ; that the commissioners, in directing the sewer to be made, and in the making of it, were acting *bona fide* in the honest discharge of their duty as commissioners, and that the sewer was fit and proper to be made for the convenient drainage of the city of *London*, and was made in a workmanlike, skilful, and proper manner in all respects, provided that the commissioners were justified in making the sewer by the mode of tunnelling. I find that, in consequence of the making of the sewer, the house of the plaintiffs was damaged to the amount of 400*l.* Upon the whole matter, therefore, I find, that if the commissioners were authorized to make the sewer by the mode of tunnelling, the verdict ought to be entered for the defendant. But if the commissioners were bound to pursue the mode which afforded the utmost possible chance of preventing damage to the adjoining buildings, the verdict ought to be for the plaintiffs, to the amount of 400*l.* ; and, thereupon, I award, that the verdict for the plaintiffs shall stand, but the damages to be reduced to the sum of 400*l.*, if the Court shall be of opinion that the verdict ought to be entered for the plaintiffs ; but if the Court shall be of opinion that the verdict ought to be entered for the defendant, then I award that the verdict already entered shall be set aside, and instead thereof that a verdict shall be entered for the defendant. And, lastly, I award that the costs of the reference and award, to be taxed by the proper officer for taxing costs in causes depending in the Court of Common Pleas, shall be borne and paid by the party against whom the verdict shall finally be directed to stand.”

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Spankie, Serjt. (*W. H. Watson* was with him,) for the plaintiffs. The commissioners of sewers were bound to exercise the utmost possible care and caution in making this sewer; and they ought to have used the method of open cutting, which the award states is attended with the least risk. The greatest possible caution and skill ought to have been used, according to the doctrine of the Roman law, as laid down in *Calvin's Lexicon*, Tit. Culpæ, 1 *Huber*, 77.

The defendants were enabled to levy a rate upon the public to defray any expenses which they might incur in executing their work. *Case of the Level of Hull* (a). This case differs from *Sutton v. Clarke* (b); because there the defendant had used his best skill and diligence in the discharge of his duty. *Slingsby v. Barnard* (c) is similar to the present case. In *Roberts v. Reid* (d) it was held, that a surveyor of highways was liable to pay damages, where he had caused a wall to be undermined, whereby it fell, although he was then acting in the execution of his office: and in that case, the declaration contained no allegation of negligence. The defendant's house is stated in the declaration to be an ancient messuage, and therefore this case is distinguishable from *Wyatt v. Harrison* (e). In *Dodd v. Holme* (f), it was alleged and proved, that the defendant so negligently, unskilfully, and improperly dug his own soil that the plaintiff's house was thereby injured: it was held, that an action could be sustained. And in that case it was shewn that the plaintiff's house was infirm, and could, at all events, only have stood a few months. That was, therefore, a much stronger case than the present. The defendants were clearly bound to give notice to the plaintiffs that their house was in danger, in order to afford them an opportunity of shoring it up. That was decided in *Jones v. Bird* (g), which was a similar action to the present, brought against the commissioners of sewers for *Westminster*. *Abbot*, C. J., there said, "One question arising at the trial was, as to the effect which shoring up would have produced; and I stated that the commissioners of sewers, and their agents, when repairing sewers in the neighbourhood of houses, were bound to take all proper precaution for their security."

By the stat. 11 Geo. 3, c. 29, s. 117, parties who bring actions against the commissioners of sewers are required to give notice of their intention, to enable amends to be tendered. This proves that it was in the contemplation of the legislature that the commissioners should be liable to pay damages to parties aggrieved, by any thing done in the execution of their duties.

Sir W. Follet, contra.—This question must be argued upon the facts which are stated in the award. The utmost possible degree of care and caution which was required by the civil law in some particular cases, is not applicable to the present case. Here the defendants were public officers, and were bound to construct the sewer for the benefit of the public. They were only bound to use their utmost diligence; and the award finds that the sewer was fit and proper for convenient drainage, and was made in a workmanlike, skilful, and proper manner, in all respects. The distinction between the liability of an in-

(a) 2 Strange, 1127.

(b) 6 Taunt. 29.

(c) 1 Roll Rep. 430.

(d) 16 East, 215.

(e) 3 B. & Ado. 876.

(f) 1 Ado. & Ellis, 493.

(g) 5 B. & Ald. 837.

dividual and of a public officer, in actions of this description, is to be found in *Governor of Glass Plate Manufacturers v. Meredith* (A), and *Boulton v. Crotcher* (i). In the latter, which was an action brought against the commissioners of a turnpike, the observations of *Holroyd, J.* are precisely in point.—“The trustees had a public duty imposed upon them by an act of Parliament. The act complained of, was done by them in the execution of that duty, and was one which they had a competent authority to do. I am of opinion that no action will lie for what they have done in the execution of that public duty, unless they exceeded the authority entrusted to them, or abused that authority by acting arbitrarily, wantonly, or oppressively, in the mode of carrying it into execution. It would be absurd to hold that an action would lie against them for doing an act which they are empowered by act of Parliament to do. The act done, being itself lawful, can only become unlawful in consequence of the mode in which it is carried into execution; and here the jury have, by their verdict, negatived the fact of the act having been done carelessly, wantonly, or oppressively.” And in *Sutton v. Clarke* (j), where one, who, in the exercise of a public function without emoluments, which he was compellable to execute, and who acted without malice and according to his best skill and diligence, did an act which occasioned consequential damage, it was held that he was not liable to an action. *Jones v. Bird* (k) is an authority to the same effect; and in that case, the defendants were only held liable because they had been guilty of negligence; but, in the present case, negligence is expressly negatived in the award. It is stated that there were heavy buildings on both sides the street, and that the sewer could not be in any way made without risk, because the soil was of a kind to make the risk considerable. If the mode of open cutting had been adopted, it does not appear that the injury would not have happened. The defendants were bound to use their best skill in performing their duties; but they were not bound to follow the course which offered the least possible risk of doing damage; and they were justified in considering the comparative expense of different modes of doing the work intrusted to them. And the award does not state that it was known to the commissioners that the mode of open cutting was attended with the least risk. As to the objection, that the defendants did not shore up the plaintiffs’ building, or give them any notice of the danger, the answer is, that the arbitrator has not found anything upon that subject, one way or the other; but he has found that the defendants were acting *bond fide* in the honest discharge of their duties as commissioners.

Spaskie, in reply. This was an ancient house, and as the award does not shew that a notice to shore up was given to the plaintiffs, the defendants would have been clearly liable, if they stood in the situation of private individuals. There is no sound foundation for the distinction which is taken in favour of the defendants as public officers; because they would be reimbursed by the public to the amount of the damages which they might have paid to the plaintiffs. But upon the ground, that the defendants have not used the least dangerous mode of making the tunnel, the plaintiffs are entitled to recover in this action. From the nature of the soil, and the peculiar difficulties which pre-

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(A) 4 T. R. 794.

(i) 2 B. & Cress. 703.

(j) 6 Taunt. 29.

(k) 5 B. & Ald. 835.

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sented themselves, it was incumbent upon the defendants to proceed with the utmost possible caution.

TINDAL, C. J.—It appears to me that the short question in this case is, whether the facts found by the arbitrator, bring the case within the terms of the declaration; and we must, therefore, see whether these facts support the allegations which are set out in the declaration. The declaration alleges that the defendants wrongfully and injuriously intending to injure the plaintiffs, did cut and dig a shaft near to the plaintiffs' messuage, and made the said shaft unskilfully, wrongfully, and improperly, without shoring up the said messuage to prevent the same from being injured; by means of which, the messuage was injured. The declaration also states that the shaft was cut without giving due notice to the plaintiffs, so as to enable them to prop up and secure the messuage; but that question is not raised before us upon the face of the award. Let us then look at the award, and see if the injury is stated to have been caused by the defendants having made the shaft unskilfully, wrongfully, and improperly. As to unskilfulness, the award finds that the sewer was made in a workmanlike, skilful, and proper manner, provided the commissioners were justified in making it by the mode of tunnelling; and if the award had found that the mischief could not have happened if the sewer had been made by open cutting, then the plaintiffs might have been entitled to retain their verdict. But the award states that a deep sewer could not be made by either method, without the risk of doing damage to the adjoining buildings. All that is said is, that the probability of damage is in some degree less when the sewer is made by open cutting, than by tunnelling.

The award then states, that if the commissioners were bound to pursue the mode which afforded the utmost possible chance of preventing damage, the verdict ought then to be entered for the plaintiffs. But how can we be called upon to say that the defendants are liable in this case? We cannot sift what is the utmost possible chance of preventing damage. That can only be shewn by the evidence of men of skill and experience, but we have no such evidence to assist us. The plaintiffs were bound to shew that the injury was sustained by the act of the defendants, as stated in the declaration; but as they have not done so, the case has not been established, and our judgment must be for the defendant.

PARK, J.—I am of the same opinion. The commissioners were public servants; and it appears on the award that a sewer could not have been made by tunnelling or open cutting, without risk of doing damage. The arbitrator goes on to state, that the amount of risk varies according to the nature of the soil, and that the soil of *Prince's Street* was of a kind to make the risk considerable. The award also finds that the probability of damage is in some degree less where the sewer is made by open cutting than by tunnelling. But how are we to estimate the degree of danger? In the following sentence it is stated, that "the commissioners, in the making of the sewer, were acting *bond fide* in the honest discharge of their duties as commissioners;" and the only ground upon which they can be charged is, if they ought to have pursued the mode which afforded the utmost possible chance of preventing damage. But I am not aware, when a party is acting *bond fide*, and for the benefit of the public.

that he is liable to pay damages under the circumstances which this case discloses.

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GASELEE, J.—As the facts are stated in this award, I am not able to give an opinion one way or the other; and I should have wished the case to be sent back to the arbitrator. I am not prepared to say that the commissioners ought to be charged, as they are stated to have acted *bond fide*, and that the tunnel was made in a workmanlike manner; but the principle upon which the commissioners selected the mode of tunnelling does not appear to me to be sufficiently stated in the award.

VAUGHAN, J.—Upon looking at the declaration and the award, I think it would be too much to say that the defendants are tort-feasors, and that they have made the sewer unskilfully and wrongfully. *Sutton v. Clarke* (1) draws the distinction between actions brought against a private individual and those against public officers. Here the defendants were acting in the discharge of a public duty; and it appears that they acted *bond fide*, and that the work was done in a skilful manner. It is said that they ought to have been acquainted with the nature of the soil, and to have adopted the mode of making the sewer which afforded the utmost possible chance of preventing damage; but, under the circumstances of the case, I agree that the judgment must be for the defendant.

Judgment for the defendant.

(1) 6 Taunt. 29.

MELIN v. TAYLOR.

June 11.

THIS was an action for criminal conversation with the plaintiff's wife. The cause was tried before Lord Denman, C. J. at the last assizes for the county of York. A Verdict was found for the plaintiff. Many servants and other persons were examined at the trial, whose testimony, if true, clearly proved several acts of adultery; but their evidence was, in many respects, improbable and contradictory: and witnesses were called on behalf of the defendant, who contradicted some of the plaintiff's witnesses. The learned judge reported that he was not satisfied with the verdict.

When a verdict appears to be against the weight of evidence, the Court will grant a new trial in an action for criminal conversation.

Wilde, Serjt. obtained a rule *nisi* for a new trial upon the ground that the verdict was against evidence (a).

Creswell, Alexander, Cowling, and Wortley shewed cause.—This is a case of conflicting evidence, and a new trial will not be granted merely because the jury might have found a verdict the other way. New trials have been frequently refused, although the judge who tried them has reported that the verdict was against the weight of evidence.—*Anonymous* (b) *Swain v. Hall* (c); *Ashley v. Ashley* (d); *Carstairs v. Stein* (e), *Bac. Abr.* Trial L. 4. In *Belcher v. Prittie* (f),

(a) The rule was refused on the ground of misdirection. See *Melin v. Taylor*, ante, page 3.

(b) 1 Wilson 22.

(c) 3 Wilson 45.

(d) 2 Strange 1142.

(e) 4 M. & S. 192.

(f) 10 Bing. 408.

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Tindal, C. J. observes, upon the subject of granting new trials, "The question now before the court is, not whether we are absolutely satisfied with the present verdict, but we are called upon to say, whether, upon the facts and circumstances that have been stated before us, and the reasoning of the learned counsel grounded upon these facts, we are able, with sufficient clearness, to see that the jury have, upon all these facts and reasons, come to a wrong conclusion in finding their verdict for the defendant; because where a case involves not matter of law, but that which is purely a question of fact, and that fact has been submitted to those whom the law has constituted the *judices facti*, we are not at liberty to take away from the party the right which he has acquired from the mouth of the jury, though we may entertain some degree of doubt, whether they have come to a right conclusion. Before we send the party down again, we ought to perceive, if not with moral certainty, at least with a degree of clearness, approaching to it, that the jury have done wrong."

And the caution which has been observed in sending civil cases down for a second trial, ought to be rather increased than diminished, where the subject matter of the injury is essentially of a criminal nature. *Norris v. Tyler* (c).

Cur. adv. vult.

June 13.

Wilde, Serj. *Wightman*, and *Blanchard*, *contrà*.

TINDAL, C. J.—We agree, that in every case in which the verdict has turned upon a question of fact which has been submitted to a jury, and there is no objection to the verdict, except that it is found, in the opinion of the court, against the weight of the evidence, the court ought to exercise not merely a cautious, but a strict and sure judgment before they send the case to a second jury.

The general rule under such circumstances is, that the verdict, once found, shall stand; the setting it aside is the exception, and ought to be an exception of rare and almost singular recurrence. The argument before us has gone the length of contending that if we send this case to a second trial, we invade the province of the jury, and, in the particular instance before us, almost insure a verdict against the defendant.

I cannot conceive how the benefit of trial by jury can be in any way impaired by a cautious and prudent application of the corrective which is now applied; for, on the contrary, I think that without some power of this nature residing in the breast of the court, the trial by jury would, in particular cases, be productive of injustice, and the institution itself would suffer in the opinion of the public. And, with respect to this particular case, I can never persuade myself that, in the cautious manner in which we express ourselves, as to the former verdict, a second jury will not exercise their judgment upon the facts brought before them, with as perfect freedom, and with as little bias, as if the investigation was, for the first time, brought before that tribunal. Strong observations have been made that we cannot have the opportunity of giving an opinion on the demeanour of witnesses at the trial. It is an observation which would apply to every case of a motion to the court, as to some of the judges, if not as to all. But, in this case, the learned judge, who presided at the trial, had that opportunity; and he has reported to us that he is not satisfied with the verdict—a course which has in it no novelty whatever, but has been the constant

practice from the earliest time at which new trials have been granted, and is acted upon every day. I shall, therefore, content myself with saying, that the present case appears to us, in some of its circumstances, of a very extraordinary character and nature, and that, as the evidence now stands, the verdict appears to us so much against the weight of the evidence, that, before we can feel satisfied in giving the judgment of the court for the defendant upon the verdict which he has obtained, we think the facts of this case ought to be reconsidered by a second jury.

Rule absolute for a new trial, on payment of costs.

JONES v. PRICE.

June 3.

TRESPASS for breaking and entering the plaintiff's close and breaking down the fences. *Plea.* That the said close in which, &c. is and at the said times, when &c. was part and parcel of a certain common, to wit, *Dolevan Common*, to wit, in the parish aforesaid; and that before, and at the same times, when &c. the said defendant was, and still is, the occupier of a certain messuage and lands, with the appurtenances, situate and being at the parish aforesaid, and that he the said defendant, and all other the occupiers of the said messuage and lands, with the appurtenances, *for a full period of thirty years before the commencement of this suit*, have actually taken and enjoyed, claiming right thereto, and without interruption, for himself and themselves, occupiers of the said messuage and lands, with the appurtenances, common of pasture, in respect of the said messuage and lands, with the appurtenances in, upon, and throughout the said closes, in which, &c. for all, his, and their commonable cattle, levant and couchant, in and upon the said messuage and lands, with the appurtenances every year, and at all times of the year; wherefore the said defendant in his own right, at the said times, when &c. entered into the said closes, in which, &c., in order to use the said common of pasture of him the said defendant there; and, in so doing, did, at the said times, when, &c. with his feet in walking, necessarily and unavoidably, a little tread down, trample upon, crush, consume, and spoil the grass and corn, then growing and being in the said close, respectively; and because the said hedges and fences, in the said declaration mentioned before and at the said times, when, &c. had been, and were, wrongfully made, and placed in and upon the close, in which, &c. so that without levelling and removing the said hedges and fences, the said defendant could not use and enjoy his said common of pasture in upon and throughout the said close, in which &c. in so ample and beneficial a manner as he might, and would, and ought to have done, the said defendant in his own right, in order to level and remove the said hedges and fences at the said several times, when, &c. entered into the said closes, and necessarily and unavoidably broke down, pulled down, prostrated, and destroyed the hedges and fences in the said declaration mentioned, and necessarily and unavoidably trod down, trampled upon, crushed, consumed, and spoiled the grass and corn in the said close, in which, &c., and took and carried away the materials of the said hedges and fences, in the said declaration mentioned, to a small and convenient distance, where the same were left for the use of the said plaintiff, doing no unnecessary damage to the said plaintiff on the occasion aforesaid, as

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In trespass. the defendant pleaded under the 2 & 3 W. 4. c. 71, that he had enjoyed a common of pasture as appurtenant to his messuage for a full period of 30 years before the commencement of the suit. The plaintiff demurred, on the ground that the plea ought to have stated that the enjoyment had been for 30 years next before the commencement of the suit. *Held*, that the plea was sufficient, for that the proof at the trial must shew the enjoyment for the 30 years preceding the action.

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he lawfully might, for the cause aforesaid, which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against him the said defendant, and this he was ready to verify, &c.

There was a special demurrer to the plea, and the points marked for argument were as follows:—that the defendant had justified the trespasses, under the 2nd and 3rd W. 4, c. 71, but had not shewn any right to justify under or in the manner pointed out by that act, inasmuch as he has only averred an uninterrupted enjoyment of a right of common for 30 years before the commencement of this suit, but had not averred or shewn that such right was actually and uninterruptedly exercised and enjoyed for 30 years next before the commencement of this suit; that it did not state that the defendant had such right of common, or any right, at the time of committing the trespasses, and that it was not a good plea, according to the said statute, for not averring the enjoyment of the right of common for 30 years next before the commencement of the suit, nor according to the system of pleading existing and in use before the passing of that act, in not stating the right to have existed from time immemorial, nor deducing the title from the owner of the fee of the premises in respect of which it is claimed. And that it was pleaded as a justification for trespasses in several closes, although plaintiff had only complained of trespasses in one close.

R. V. Richards in support of the demurrer. The declaration ought to have averred the enjoyment of the right of common for 30 years *next* before the commencement of the suit. It is clear by 2 & 3 W. 4, c. 71. s. 1, 4, & 5, that the enjoyment must be for 30 years preceding the action, but if issue were taken upon this plea, then proof of enjoyment for 30 years, but not next before the suit, would be sufficient. In the pleadings in *Monmouth Canal Company v. Harford* (a), and *Wright v. Williams* (b); the pleadings under this statute stated the enjoyment to be “next before” the commencement of the suit (c).

Maule contra was stopped by the Court.

TINDAL, C. J.—It appears to me, that the fourth section of the statute contains a mere exposition of the proof necessary to establish a right. It would have been very easy to say in the plea, that the right had been enjoyed for 30 years next before the commencement of the suit. After all, it is a mere question of evidence, and the enjoyment for 30 years next before the suit must be proved.

PARK, J.—It is manifest that this is a matter of proof at the trial. The defendant cannot succeed unless he proves the right for 30 years next before the commencement of the suit.

VAUGHAN, J. concurred.

Richards craved leave to withdraw the demurrer, which was granted on the usual terms.

(a) 1 Cr. M. & R. 614.
 (b) 1 Meeson & Wels. 77.

(c) See also the pleadings in *Beasley v. Clarke*, *ante*, page 100.

GOODFELLOW v. ROBINS.

May 24.

CROWDER moved that the defendant might be discharged out of custody, under 48 G. 3, c. 123, he having been in prison upwards of twelve months, for damages under 20*l.* in an action for criminal conversation with the plaintiff's wife. He cited *Winter v. Elliot* (a); where it was held, that the statute is applicable to the case of persons in execution for damages in actions of assault.

A debtor, in execution for more than 12 months, for less than 20*l.* damages given in an action for crim. con., is entitled to his discharge under 48 Geo. 3, c. 123.

Barstow shewed cause.—The statute is not applicable to a case of this description. The title of it is “An Act for the Discharge of Debtors in Execution for small Debts from Imprisonment in certain Cases;” and then follows a recital that the act would tend to the relief of certain debtors, and at the same time occasion no material prejudice to trade and public credit. And in the latter part of the first section, it is provided “that no proceeding whatever, by *scire facies*, action, or otherwise, shall be maintained or had against the bail in any action upon the judgment wherein the defendant or defendants shall have been discharged in execution.” This shews that the statute was intended to apply only to cases where the defendant could be arrested. In *Winter v. Elliott* (a), the attention of the Court was not called to this part of the statute. In all the insolvent acts there is an express enactment, for the purpose of delaying the discharge of insolvents, who are in custody for damages recovered in actions for criminal conversation.

TINDAL, C. J.—I see no reason for differing from the Court of King's Bench. It is to be observed that there is a boon given to the plaintiff by the statute; he may sue out a writ of *fi. fa.* and take the defendant's property after he is discharged; and the legislature may probably have thought that where the sum is so small, a sufficient compensation would thereby be given.

PARK, J. and GASELEE, J. concurred.

VAUGHAN, J.—The statute ought to be construed liberally.

Rule absolute.

(a) 3 Nev. & Man. 315; 1 Ado. & Ellis, 24.

KNIGHT v. WOORE.

May 24.

TRESPASS for breaking and entering the plaintiff's close, and breaking his gate.—The defendant pleaded, first, not guilty; 2ndly, that the *locus in quo* was a public highway, and that all the king's subjects had a right to use it with horses and carriages, to fetch and carry goods and water thereon; and thirdly, a like justification, alleging the right to be for the inhabitants of *Monmouth* to use the way for the same purposes. At the trial a verdict was found for the plaintiff on the first and second issues, and for the defendant on the

Where a plea in trespass, justified under a right of way over the *locus in quo* for the carriage of goods and water, and the jury negatived the right as to the goods, but

affirmed it as to the water:—*Held*, that the plea was disjunctive, and that the defendant was entitled to have the verdict entered for him as to the right to carry water.

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third issue, so far as it related to the carrying of water; but the jury negatived the defendant's right as to the carriage of goods.

Ludlow, Serjt. obtained a rule *nisi* to enter a verdict for the plaintiff upon all the issues.

Maule and *Whateley* shewed cause.—The third issue must be taken distributively, and be entered for the plaintiff as to the right to carry goods; and for the defendant as to the right to carry water. The rules of court Hil. T. 4 W. 4. pl. 5, 6, 7, shew that such a plea as this must be taken distributively. In rule 5 it is said "That pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed." Therefore the defendant was prevented from pleading two pleas with separate justifications. In *Pythian v. White* (a) the Court of Exchequer ordered a verdict to be entered distributively.

Ludlow, Serjt. and *R. V. Richards*, in support of the rule, contended that the issue was substantially found for the plaintiff, and that the verdict ought to be entered for him generally.

TINDAL, C. J.—This case seems to me to fall precisely within the rules of Hil. Term. 4 W. 4. The fifth and sixth rules seem to contemplate that a justification, claiming such a right as this, is, in its nature, distributable. Here the verdict must be entered for the plaintiff as to the right to carry goods, and for the defendant as to the right to carry water.

PARK, J.—We should defeat the object of the new rules of pleading, which was to prevent multiplied pleas, if we did not hold that this issue may be distributed.

GASLEE, J.—Suppose the defendant had justified a right of way for horses, carts, and other carriages, and had only proved his right to go with horses? That would entitle him to a verdict as to the right of way for horses.

VAUGHAN, J.—I am of the same opinion. The issue is capable of being taken distributively, and it ought to be so taken.

Rule accordingly (b).

(a) Since reported, 3 Cr., M., & Ros. 216.

(b) A question came before the Court on a subsequent day, as to the proper mode

of taxing the costs of this cause. See *Knight v. Woore*, 3 Hodges, 1.

May 31

SMITH v. SMITH.

TROVER to recover a watch. *Pleas*.—1. Not Guilty. 2. That the watch was not the property of the plaintiff. At the trial before *Vaughan*, J. In trover to recover a watch, the defendant pleaded that it was not the property of the plaintiff. It appeared that the watch had formerly been the property of the father of the plaintiff and defendant, who were two brothers. The defendant put in evidence letters of administration of his father's effects, which had been granted to him. *Held*, that the plaintiff, in answer to this evidence, was entitled to give evidence of conversations in which the deceased had stated that he had given the watch to the plaintiff.

It was in evidence, that the plaintiff and the defendant were brothers, and that the watch had formerly been the property of their deceased father. The defendant, who was the elder brother, at first relied upon the infirmity of the plaintiff's title: but towards the close of the case, his counsel put in evidence the letters of administration of his father's effects which had been granted to him. For the purpose of shewing that the watch formed no part of the father's estate, evidence was then tendered, by the plaintiff, to prove that the intestate had stated, in several conversations, that he had given the watch to the plaintiff; but the learned judge rejected the evidence, and a verdict was found for the defendant.

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Bompas, Serjt. obtained a rule nisi for a new trial upon the ground that the evidence ought to have been received. He relied upon *Ivatt v. Finch* (a); where it was held upon an issue between A. & B., whether C. died possessed of certain property, that evidence might be given of declarations made by C., that she had assigned the property to A.

Byles shewed cause.—The defendant did not claim, as administrator of the former owner of the watch, but he relied on his possession; and the plaintiff was bound to prove a better title. When the declarations were made, the father was not in possession of the watch; and therefore this case differs from *Pocock v. Billings* (b), where the declarations of a former holder of a bill of exchange were received in evidence, because they were made during his possession of the bill. Nor are these declarations evidence upon the ground of identity of interests between the parties, as was the case in *Woolway v. Rowe* (c).

It is a well-established rule of law, that a party cannot make evidence in his own favour, *Glyn v. Bank of England* (d); *Rex v. In. of Debenham* (e); *Bernasconi v. Farebrother* (f). It will be said that this was a declaration made against the interest of the party making it; but in this case the declarations were not made in the course of business, but were mere idle, casual, gratuitous statements; and there is no case where, under such circumstances, the evidence has been received. *Ivatt v. Finch* (a) is distinguishable, because there the defendant necessarily claimed under the party whose declarations were received.

Bompas, Serjt. and *Chandless* in support of the rule.—*Ivatt v. Finch* (a) is precisely in point; and there the declarations were made after the property had passed out of the hands of the party making them, and it is stated, in that case, that the declarations were unaccompanied with any act. As the letters of administration were given in evidence, it is clear that the defendant relied on the title which he thereby acquired. If the father had been alive, the conversations would have been admissible against him, in any action in which he claimed the watch as belonging to him. *Woolway v. Rowe* (c) does not apply. In *Roe d. Brune v. Rawlings* (g), where A., as tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from his

(a) 1 Taunt. 141.

(b) Ry. & Moody, 127.

(c) 1 Ado. & Ellis, 114.

(d) 2 Vesey, 43.

(e) 2 B. & Ald. 185.

(f) 3 Bar. & Adol. 372.

(g) 7 East 279.

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confidential agent, containing an account of the tenants and rents, on which the tenant for life indorsed the words, "a particular of my estate," and handed it down to B. the succeeding tenant for life, who had a like limited power of leasing, by whom it was preserved and handed down amongst the muniments of the estate to the first tenant in tail; it was held that the document was evidence for the first tenant in tail against the lessee of B., in order to shew that the rent reserved by B., the tenant for life, was less than the ancient rent which was reserved, at the time to which the paper referred, the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the other way, viz., to diminish the rent, in order to increase his fine upon a renewal, under the power.

TINDAL, C. J.—I found my opinion upon the position of the cause at the exact time when it was left to the jury. It is true that the pleadings raised a negative issue, on the part of the defendant, namely that the plaintiff had no property in the watch; but it is also true that a negative issue may sometimes be made out by affirmative evidence produced by the defendant. Here, when the case was about to be submitted to the jury, the defendant produced the letters of administration to shew that he was the administrator of his father's effects. The effect which this evidence produced in the minds of the jury we cannot tell; and then strictly in answer to this part of the case, it was proved, by the plaintiff, that the intestate had stated, in several conversations, that the property in the watch was not in him. This is quite as strong a case as *Ivatt v. Finch* (k), because the defendant claimed under the intestate, and as his representative, and, therefore, I am of opinion that the declarations were admissible. The rule must be made absolute.

PARK, J.—In answer to the letters of administration, the plaintiff was entitled to prove the declarations which had been made by the intestate.

GASELEE, J. concurred.

VAUGHAN, J.—The letters of administration were not put in, until the defendant's case was nearly closed; and I did not give the question the same consideration, which I might otherwise have given it. I concur in the opinion which the Court has expressed.

Rule absolute.

(k) 1 Taunt, 141.

May 24.

STANLEY v. TOWGOOD.

Where there is a general covenant to repair a house and premises, and to leave them in repair at the expiration of the term; upon an action for a breach of the covenant, the lessee cannot shew that the premises were out of repair at the commencement of the lease; but he may shew that the premises were old, because the lessee is only bound to keep up the house as an old house.

COVENANT upon an indenture of lease of a messuage and premises for fourteen years from *Michaelmas*, 1823.—The declaration set out the covenant as follows: That the lessee should and would, during the continuance of the said

ten years from *Michaelmas*, 1823.—The declaration set out the covenant as follows: That the lessee should and would, during the continuance of the said

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demise, preserve, and keep, and at the end, or other sooner determination of the said term of fourteen years thereby granted, leave the said demised messuage, and other buildings, and all the outhouses, offices, windows, doors, drains, sewers, pipes, and other water-courses, gates, hedges, and fences belonging to, in, or about the said demised premises, in good and tenantable order and repair: all losses and damages by fire or tempest, in the mean time, excepted.

Breach.—That the lessee, until the commencement of the suit, suffered and permitted the said demised premises to be and continue, and the same were, ruinous, prostrate, out of repair, and in great decay, for want of needful and necessary maintaining, upholding, supporting, and keeping the same.

Plea.—That the defendant had, during the continuance of the demise, preserved and kept the premises in good and tenantable order and repair, according to the form and effect of the said indenture.

At the trial before *Bolland*, B. at the last *Abingdon* assizes, the following facts were in evidence: The demised premises consisted of an ancient dwelling house; and several of the plaintiff's witnesses proved that the floors and a garden-fence, belonging to the house, were left out of repair at the end of the tenancy. They also proved that a lean-to, which had been erected by the defendant, during his term, was out of repair, so that the rain penetrated through the roof. For the defendant several witnesses were called, who stated that the premises were of very great antiquity, and that, under the circumstances, they considered them to be left in good repair. Upon cross-examination the witnesses admitted that some trifling repairs were required. As to the lean-to, they attributed the imperfect state of the roof, to an original defect in the construction of the building, which they described as being pitched too low. The counsel for the parties did not agree as to the mode in which the learned judge left the case to the jury at the trial. The defendant's counsel contended that the jury were told that they were not to consider whether the premises were new or old, at the commencement of the tenancy. The plaintiff's counsel insisted that these observations, only applied to certain evidence which was tendered for the defendant, to shew that the premises were in a better state of reparation, at the determination of the tenancy, than they were at the commencement. A verdict was found for the plaintiff, with 14*l.* 10*s.* damages, being 8*l.* 10*s.* in respect of the general repairs, and 6*l.* in respect of the defective state of the lean-to.

Storks, Serj. obtained a rule *nisi* for a new trial, upon the ground of misdirection, or, in pursuance of leave reserved at the trial, to reduce the damages to 8*l.* 10*s.*, if the Court should be of opinion that the defendant was not liable to pay the damages given in respect of the lean-to.

Kelly and *F. Gunning* shewed cause.—When a lessee enters into an absolute and unequivocal covenant to repair premises, and deliver them up in repair, at the end of the term, it is no answer to say that the premises were out of repair at the commencement of the tenancy. A reduction of rent is often made in consideration of the repairs which are to be done by a lessee. The learned judge told the jury, that the defendant was not entitled to go into the question of the state of the repairs at the time of the entry; and it is clear, from the amount of the verdict, that the jury did not misunderstand this observation,

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because larger damages would have been given, if the jury had supposed that it made no difference, whether it was an old or a new house.

Harris v. Jones (a), and *Gutteridge v. Manyard* (b), are not inconsistent with the present case. There, as here, the question was left to the jury, upon the words of the covenant, and the only difference is, that, in these cases, the jury considered that there had been no breach proved. As to the non-repair of the lean-to, it certainly appeared that the roof was not water-tight, through a defect in its original construction; but if the lessee chose to erect new buildings, he is bound by the covenant to leave them in good repair. In *Bac. Ab. Tit. Covenant* (E), it is said, "if a man takes a lease of a house and land, and covenants to leave the demised premises in good repair at the end of the term, and he erects a messuage upon part of the land, besides what was before, he must keep or leave this in good repair also." And as the verdict is under 20*l.*, the Court will not send the cause down for a new trial, upon the ground that the damages are excessive.

Storks, Serj. and *Biggs Andrews* in support of the rule. The case was not properly left to the jury. In *Harris v. Jones* (a), where the covenant was similar to this one, the jury were asked whether the covenant had been really and substantially complied with, and they were told that it was hardly to be expected that a strict and literal performance of so general a covenant could be proved; and that the defendant was only bound to keep up the house as an old house, not to give the plaintiff the benefit of new work. In *Ferguson v. ———* (d), Lord *Kenyon* said, that a landlord had no right to claim a sum for putting on a new roof on an old worn-out house; and in *Gutteridge v. Manyard* (b) *Tindal*, C. J. said, "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term (e); what the natural operation of time flowing on, effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord; but the tenant is to take care that the premises do not suffer more than the operations of time and nature would effect. He is bound, by seasonable application of labour, to keep the house, as nearly as possible, in the same condition as when it was demised; if it appears that he has made these applications, and laid out money, from time to time, upon the premises, it would not, perhaps, be fair to judge him very rigourously by the reports of a surveyor, who is sent upon the premises, for the very purpose of finding fault."

The defendant was, therefore, clearly entitled to shew the state of the premises at the time the lease was granted. The lean-to was originally defective, and would never keep out the rain. When a tenant makes new erections, he may construct them as he pleases. He may build up walls, and put no roof upon them; or build a house without floors, and, in either case, he would not be liable under this covenant to be sued for non-repair. In some cases, he might, perhaps, be liable for waste. Suppose a cow shed was built, and covered with straw, which did not keep out rain, although it would afford shelter, could it be said that the lessee would be liable to thatch? This is a

(a) 1 M. & Robinson, 173.

(b) 1 M. & Robinson, 336.

(d) 2 Esp. 590.

(e) See also *Soward v. Leggatt*, 7 Car. & P. 616, *coram* Abinger, C. B., to the same effect.

complaint that the lessee did not originally make a better roof on the lean-to. Non-repair means a want of restitution to its original state.

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TINDAL, C. J.—This is an action for the breach of a covenant in a lease of certain premises for fourteen years. The tenant covenanted that he would preserve and keep, and at the end of the term leave, the messuage and buildings, and all outhouses, offices, windows, doors, drains, sewers, pipes, and other water-courses, gates, hedges, and fences belonging to the premises, in good and tenantable order and repair. The defendant pleads performance of the covenant; and the question for the jury was, whether the premises had been kept and left in good and tenantable order and repair. I agree that the point to be decided was, whether the premises had been substantially repaired, and if the plaintiff had sustained any damage. It certainly is not sufficient to shew a cracked pane of glass, or the like; but something tangible ought to be brought before the jury. Here the jury gave damages to the amount of 14*l.* 10*s.*; and the grounds upon which this application is founded are two. First, as to 8*l.* 10*s.*, it is said that the judge misdirected the jury. The ground of misdirection which has been stated is, that the judge told the jury that it was of no consequence, in considering the verdict, whether the premises were completely old or completely new, when the tenant took possession of them. If such had been the direction, there ought to be a new trial; but the learned baron does not report to us that he gave any such direction. The statements made by the counsel at the bar, during the argument, do not agree as to what the direction really was, and probably no more was intended to be expressed in the language which has been adverted to, than the principle that, under such a covenant, the jury were not to consider the state of repair of the premises at the time of the demise. This must have been the course which the cause took, because the cross-examinations had reference to the state of the premises at the time they were taken. The question then resolves itself into this, *viz.*, whether the damages are too large, because the defendant's own witnesses admit that some repairs were wanting. One witness stated that the floor was worm-eaten; but that it could be put into substantial repair for twenty shillings; another, that it would require the expenditure of two pounds to repair the fences; and that some of the glass was cracked. How then are we to say, when the defendant's witnesses give this evidence, that the plaintiff is not entitled to a verdict. It was a mere question of amount of damages, and we have no authority to interfere with the amount of the verdict, when only 14*l.* 10*s.* has been recovered. If the learned judge had said that the antiquity of the premises, at the time of the demise, made no difference, I should not have gone so far, because I think that was material; but upon the ground which has been already stated, I am of opinion that this rule must be discharged.

PARK, J. concurred.

VAUGHAN, J.—We cannot travel out of the report of the learned judge; and as only 14*l.* 10*s.* has been recovered, the Court cannot interfere with the verdict.

Rule discharged.

June 8.

BROGDEN v. MARRIOTT.

An action was brought for a breach of the following agreement.

The plaintiff agreed to buy, and the defendant agreed to sell his horse, *Partington*, for 200*l.* provided he trotted 18 miles within one hour, within one month; and if the task was not performed, the horse was thereby sold to the plaintiff for 1*s.* which the plaintiff that day paid to the defendant. At the trial it appeared that the task was not performed, and that the defendant had refused to deliver the horse to the plaintiff; a verdict was found for the plaintiff. *Held*, upon a motion to arrest the judgment, that this agreement was illegal, and within 9 Anne 14; *Gaselee, J. dissente*, who thought that the question of illegality ought to have been raised by a plea on the record.

THIS was an action brought for the breach of an agreement made between the plaintiff and defendant, in the following terms: The plaintiff agreed to buy, and the defendant agreed to sell his horse, *Partington*, to the plaintiff, for the sum of 200*l.*, provided he trotted eighteen miles within one hour, and that to be done within one month from that day: and *Joseph Norcliffe of Ossett* to be the judge of the performance. If the task was not performed; the horse was thereby sold to the plaintiff for the sum of 1*s.*, which the plaintiff that day paid to the defendant (a). At the trial, before *Denman, C. J.*, at the last *Yorkshire* assizes, evidence was given of a trial of the horse having been made, in which it failed to perform the task mentioned in the agreement, and a verdict was found for the plaintiff, subject to leave reserved to move the Court to enter a nonsuit.

Creswell obtained a rule nisi to enter a nonsuit, or to arrest the judgment upon the ground that the agreement was illegal.

R. Alexander and Milner shewed cause.—This is a sale of the horse upon a condition, subject to a different condition, if it does not perform a certain distance in a certain time. The animal might be altogether useless to the plaintiff, unless it possessed the required qualification. A person might agree to give a certain sum for a steam engine of twenty horse power; but if it were only of eighteen horse power, it might be of no value for the purposes for which it was required. So chemical agents might be required of a certain strength, for the purpose of making experiments, which could not be made if of a less strength. So here why should not the value of the horse to the plaintiff depend entirely upon the result of the required performance? The jury might have found that the match was a nuisance, under the fourth issue which was raised; and if the defendant relied upon the agreement being illegal under the statute against wagers, it ought to have been pleaded; as was said by *Gaselee, J.* upon the argument of the demurrer. He said, "The third objection is, that the declaration discloses an illegal contract; but that point is not stated in the points specified for argument; and as there is a plea in which the objection is raised, the cause may go down for trial upon that point, which is a proper question for the decision of a jury (a)." The trotting of the horse was a condition for the benefit of the defendant; and it was for him to shew that he was entitled to the higher price which was stipulated for. The proof of the performance formed no part of the plaintiff's case.

J. Bailey in support of the rule.—The stat. 13 G. 2, c. 19, which was passed for the encouragement of *bona fide* races on the turf, does not apply to the match which is stated in the agreement (b). By the previous statute, 9 Anne.

(a) See this case argued on demurrer, *Brogden v. Marriott*, 1 Hodges 383; 2 Bing. N. C. 473; 2 Scott. 712.

(b) See *Whaley v. Pajot*, 2 Bos. and Puller, 51.

c. 14, (d), this was an illegal wager, and the agreement cannot, therefore, be enforced; and if it be supposed that the horse and 200*l.* were the stakes to be played for, then this case is also within the 16 Car. 2. c. 7, s. 3, (e).

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TINDAL, C. J.—It is only necessary to consider this case as it appears upon the record; for if the contract there set forth is within the mischief contemplated by the statute of 9 Ann. c. 14, it is unnecessary to say that the action cannot be supported. I agree that if there be any doubt as to the nature of the contract, it should have been raised by a plea, so that the question might be submitted to a jury. It must therefore appear, on the record, that this contract is illegal. It appears to be a contract of sale, by which the property in a horse is transferred to the plaintiff, at a conditional price. Now what is the condition upon which the price is to depend? The plaintiff says, if the horse trots eighteen miles within one hour, I will give 200*l.* for him; but if he does not, I will pay but one shilling. Therefore it depends upon the task being performed, whether the plaintiff shall pay 200*l.* for the horse, instead of one shilling; on the other hand, if the distance was not duly performed, the defendant was to give up the horse for one shilling. Upon looking at this case, I can only see that this contract was to turn on the event of a trotting match against time. If this had been a contract to be determined by any innocent trial, not within the meaning of any statute, the case might be different; if, for instance, as it was put in the argument, it were a contract to supply a steam-engine, or materials for chemical purposes, I am not prepared to say that it would be void. But this was clearly a wager within the statute, where more than 10*l.* was at stake, and this rule to arrest the judgment must be made absolute.

PARK, J.—I am of the same opinion. The cases which have been put of the purchase of a steam-engine, or of materials for making philosophical experiments are wholly inapplicable, because the articles would be useless, if they were not of the description contracted for.

(d) Sect. 1. enacts, "That all notes, bills, bonds, judgments, mortgages, or other securities, or conveyances whatsoever, given, granted, drawn, or entered into, or executed by any person, or persons whatsoever, where the whole, or any part, of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won, by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid; or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid; or that shall, during such play so play or bet, shall be utterly void, frustrate, and of none effect."

(e) By sect. 3. "If any person or persons shall play at any of the said games, or any other pastime, game, or games, whatsoever (other than with and for ready

money); or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of 100*l.*, at any one time or meeting, upon ticket, or credit, or otherwise, and shall not pay down the same, at the time when he or they shall so lose the same, the party and parties who loseth, or shall lose the said monies or other thing or things so played or to be played for above the said sum of 100*l.*, shall not, in that case, be bound or compelled, or compellable to pay, or make good the same; but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities, whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same, or any part thereof, shall be utterly void, and of none effect."

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GASHLEE, J.—I am not prepared to say, that upon these pleadings the judgment ought to be arrested. It was a question for the jury to say, whether this was an illegal wager; and the proper course would have been for the defendant to have raised that point, by putting it in a plea on the record. In *Lynall v. Longbotham* (a), it was decided that a foot-race was a game within the statute 9 Ann. c. 14; but the Court decided in favour of the defendant, because it was not stated, in the declaration, that the party was playing, and the Court said, that they could intend nothing which did not appear. That case is certainly not precisely in point, because it related to the recovery of a penalty. Here the sum was large, and a jury would probably be disposed to believe it was a wager. But suppose the buyer of a horse considered him worth only 80*l.*, although the seller demanded 100*l.*, and then that an agreement was made that the price should depend upon a trial, whether the horse would trot a certain number of miles within an hour; in such a case the jury might be warranted in finding that it was a *bond fide* transaction between the parties.

VAUGHAN, J.—I agree that this rule should be made absolute. If the contract were doubtful and equivocal, on the face of the record, the verdict ought not to be disturbed; but, considering the nature of this contract, is it possible to look at it without seeing that it is within the statute?

Rule absolute.

(a) 2 Wils. 36.

May 26.

GRISSELL and Another v. ROBINSON.

The defendant entered into a parol agreement with one *Peto*, for a lease of certain premises; but *Peto* died before any lease was executed. The plaintiff's were *Peto*'s executors; and a master in Chancery having decided that the contract was void under the stat. of Frauds, a new contract was made between the defendant and the plaintiff for a lease of the same premises, which was afterwards executed, and the solicitor to the plaintiff prepared the lease. The defendant refused to pay for the lease which had been so prepared, whereupon the executors paid the attorney, and brought this action in their own name, for money paid to the defendant's use. At the trial it was proved that it was the general practice in London, for the lessee to pay the lessor's attorney the expenses of preparing a lease:—*Held*, that the plaintiff's were not bound to sue as executors; and, secondly, that the action for money paid was maintainable without declaring specially.

ASSUMPSIT for money paid by the plaintiffs to the use of the defendant.—*Plea*, Non Assumpsit. At the trial before *Park, J.* at the *Middlesex* sittings, the following facts were in evidence. The plaintiffs were executors of one *Peto*, who died in 1830. The defendant had entered into a verbal contract with *Peto*, in consideration of 450*l.* to be paid by the defendant, for a lease of certain building ground, for a term of twenty-one years; and 300*l.*, part of the purchase money, had been paid, and the defendant was let into possession of the premises. After the death of *Peto*, his executors performed the trusts of his will under the direction of the Court of Chancery; and the defendant applied to the Master for a specific performance of the agreement, which he had made with *Peto*; but the master refused to interfere, upon the ground that the agreement was not binding, under the provisions of the Statute of Frauds. After some negotiation the plaintiffs then agreed to grant a lease to the defendant, upon terms which were founded upon those in *Peto*'s agreement; and in May, 1834, the lease was executed by the parties. It recited that *Peto* had, in his life-time, agreed with the defendant to grant to him a lease of the piece of ground thereafter-mentioned, for a term of twenty-one years, at

a certain rent; the death of Peto; and that the plaintiffs were appointed his trustees and executors; and it was witnessed that the lease was made in consideration of the 300*l.* paid to Peto in his life-time; and of 150*l.* then paid by the defendant to the plaintiffs.

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This lease was prepared by Mr. Taylor, the solicitor to the executors, who demanded his bill of costs for preparing the lease and counterpart of the defendant; but, on his refusal to pay, Taylor was paid by the plaintiffs, out of a fund in chancery, belonging to Peto's estate, and the plaintiffs thereupon commenced the present action to recover the amount so paid to Taylor.

Several solicitors were examined at the trial, who proved that it was the accustomed practice in London, for leases to be prepared by the lessor's solicitor, at the expense of the lessee. A verdict was found for the plaintiffs.

Talfourd, Serj. obtained a rule nisi to enter a nonsuit upon two grounds:—1st, That the action ought to have been brought by the plaintiffs in their representative character; 2ndly, That the plaintiffs should have declared specially.

Thesiger and W. H. Watson shewed cause: First, there was no existing contract between the defendant and Peto, which could be enforced; and the arrangement, which was afterwards effected, was altogether a new one. The plaintiffs, as trustees and executors, had power to deal with the land as they pleased; and although the new contract referred to the terms of the old one, that does not prevent the plaintiffs from suing in their own right. Here the custom shewed that the defendant was primarily liable to pay the attorney who prepared the lease. In *Brassington v. Ault* (a), three executors ordered goods to be sold as the goods of their testator, and they afterwards sued for the amount, without styling themselves executors; and, upon an objection that a fourth executor ought to have been joined as plaintiff, it was held that they were entitled to recover, upon the ground that, as they alone had made the contract, they alone ought to sue. It is admitted that the plaintiffs might have sued as executors. *Aspinall v. Wake* (b).

Secondly. It is said that the declaration should have been framed specially upon the custom which was proved. It may, perhaps, be contended that Taylor could not have recovered immediately against the defendant, because no retainer was proved, according to the decision in *Rigley v. Daykin* (c); but in that case no custom for the defendant to pay was proved. The existence of the custom need not be pleaded. [Tindal, C. J.—The witness spoke of the general course of business; it is not, strictly speaking, a custom.] In *Pownall v. Ferrand* (d) the principle is laid down that one man who is compelled to pay money, which another is bound by law to pay, is entitled to be reimbursed by the latter. *Speacer v. Parry* (e) is distinguishable, because the defendant was under no original legal obligation to pay the amount which the plaintiff sought to recover. In *Brown v. Hodgson* (f), it was decided that if a carrier, by mistake, delivers to P. goods consigned to F., and P. appropriates the goods,

(a) 2 Bing 177; 9 Moore, 340. 1 C & P. 602.

(b) 10 Bing. 51; 3 M. & Scott, 422.

(c) 2 C. & J. 83.

(d) 6 B. & Cress. 443.; 9 Dow. & Ry. 608.

(e) 1 Har. & W. 179; 4 Nev. & M. 770
3 Ado. & Ellis, 331.

(f) 4 Taunt. 189.

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and the carrier, on demand, in that action, pays C. their value, the carrier may recover against B. as money paid to B.'s use. Indeed it is a general rule that in all cases where a person is compelled to pay money for which another is primarily liable, he may recover, in an action for money paid to the other's use. *Dawson v. Linton* (a); *Esall v. Partridge* (b); *Pownall v. Ferrard* (c). At all events, the money paid for the stamp was money paid by the plaintiffs to the defendant's use, *Adams v. Dansey* (d).

Talfourd, Serjt. in support of the rule.—First, the money paid to *Taylor* was not the plaintiff's money, but it came out of *Peto's* estate. The lease which was executed, was founded upon the agreement made with *Peto*; and although that agreement was not in writing, it had been part performed, and the defendant had a remedy to obtain the lease. [*Tindal*, C. J.—The master in chancery refused to enforce the agreement at all.] As to the question, whether this is the proper form of action, it may be asked, whether the defendant was or was not liable to pay *Taylor*. If he was not, money had and received will not lie. The plaintiffs were, in that case, mere volunteers, and cannot recover in this action, *Stokes v. Lewis* (e), where it was held that assumpsit for money paid would not lie, when the money was paid against the express consent of the party for whose use it is supposed to have been paid.

TINDAL, C. J.—The first objection raised in this case is, that the plaintiffs have sued in their personal characters and not as executors. It is contended that as the payment of the money arose out of a contract which was made in the life-time of the testator, the plaintiffs ought to have sued as executors; but it appears to me, that as the money was paid upon a state of facts arising altogether after the testator's death, the plaintiffs had a right to sue in their own names. The struggle has generally been the other way, when plaintiffs were accustomed to sue as executors, to avoid the payment of costs, if they failed; and the objection then was, that they had no right to sue in that character. *Ord v. Fenwick* (f) was a case of this description. There it was not doubted that the plaintiff might have sued in her natural character; but the objection was that she should not have declared as executrix. I only mention this case to shew that the contention has generally been to compel plaintiffs to declare in their natural capacity. Here there had been a parol contract between the testator and the defendant, and part of the consideration was paid; the testator died, and his affairs falling into chancery, the master refused to enforce the contract, but left the parties to their own discretion. The lease, which was afterwards executed, was founded on a new and distinct proposal which was made by the plaintiffs; and the origin and ground of the contract depended on a state of facts which occurred after the death of the testator.

The second objection is, that the plaintiffs ought to have declared on the special contract. The distinction taken upon this subject is, that if any act is to be done before the money is to be received, then the plaintiff must sue on the special contract; but when all has been done which is to be done, then it is

(a) 5 B. & Ald. 521; 1 Dow. & R. 117.

(b) 8 T. R. 308.

(c) 6 B. & Cress. 439; 9 Dow. & R. 603.

(d) 6 Bing 506; 4 M. & P. 245.

(e) 1 T. R. 20.

(f) 3 East, 107.

sufficient to declare on the general count, and to prove that the money was paid by the implied or expressed assent of the defendant. Here the money was paid to the attorney *Taylor*, for preparing the lease, and the question is whether this was money paid to the use of the defendant. It was proved at the trial that it is the usual practice in this Metropolis for the lessor's attorney to prepare the lease at the expense of the lessee. That question was left to the jury, and they decided it in favour of the plaintiffs. The question is, whether this transaction does not shape itself in the most short and concise way, as money paid to the use of the defendant, and it is clear that the payment was made for the ultimate benefit of the defendant. In all cases of money paid by one joint surety for the benefit of another, a special contract may be stated in suing the co-surety for re-payment; but even then the payment is virtually money paid to the use of the co-surety, because it was made under a contract that he should be ultimately liable. So here the plaintiffs were liable to the attorney, but they made the payment for the defendant's benefit. I am, therefore of opinion that this action is maintainable.

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PARK, J.—I am of the same opinion. As to the first point, whether the plaintiffs ought to sue in their personal or representative character, I agree that this was money paid after the death of the testator; and although the contract for the lease had a beginning before his death, yet the whole agreement was clearly concocted and settled by the plaintiffs after his death. There was a new proposal, and the case is brought very near the decision in *Ord v. Fenwick* (a).

As to the second question, it seems to me that there was an original liability on the part of the plaintiffs to pay their own attorney in the first instance, but the evidence was all one way to shew that the lessee was ultimately liable to pay the expense of the lease: and, therefore, this was money paid for the defendant's use.

GASELNE, J.—I will only observe that there is another class of cases which shews that in all actions for work and labour which is to be done at particular times, or in a particular manner, the declaration may be in the general form, when the conditions have been performed (b).

VAUGHAN, J.—I agree that this rule should be discharged. It has been satisfactorily shewn that this action was properly brought by the plaintiffs in their individual character. If this case had happened before the late statute which renders executors liable to pay costs, it would then have been contended that the plaintiffs ought to have sued in their individual capacity.

It appears that the original contract with *Peto* could not have been enforced, and therefore the plaintiffs entered into a new contract after his death,

As to the other point, as soon as it was ascertained that the defendant was liable to pay the costs of the lease either primarily or ultimately, the money was paid by the plaintiffs to his use.

Rule discharged.

(a) 3 East. 107.

(b) See *Alexander v. Gardiner*, and the cases there cited 1 Hodges, 147; 1 Bing, N. C. 671; 1 Scott, 281; 3 Dow. P. C. 146.

June 2. **GOLDSMID, Assignee of HIRSCHFIELD, a Bankrupt, v. LEWIS.**

Section 50. of the Insolvent Debtors' Act, (7 G. 4, c. 57.) provides that the discharge of a prisoner shall extend to all process and costs for contempt, and to all costs incurred by a creditor in any action or suit brought for the recovery of any debt or damages; *Held*, that this was applicable to the costs of an action of trover, in which the verdict was obtained before, and the costs were taxed after the filing of the insolvent's petition.

BOMPAS, Serjt., obtained a rule *nisi* for the discharge of the defendant out of custody, he having been taken in execution for the damages and costs in this action, under the following circumstances:—The plaintiff sued as assignee of the bankrupt, in trover, to recover goods delivered to the defendant by the bankrupt, and obtained a verdict for 31*l.* at the sittings in *Hilary* Term. On the 9th *March*, before judgment was signed, the defendant filed his petition in the Insolvent Debtors' Court, and in his schedule he inserted the following particular of the debt due from him to the estate of the bankrupt:—"M. A. Goldsmid, official assignee of F. Hirschfeld, a bankrupt, 231*l.* and costs. In *April* last, I purchased a quantity of candles from the bankrupt, for which I paid him. The assignees have since brought an action against me, in the Court of Common Pleas, on the ground that he had committed an act of bankruptcy prior to my purchase; and they have recovered a judgment against me for 31*l.* the remaining 200*l.* inserted as supposed costs."

The defendant was duly discharged by the Insolvent Debtors' Court, on the 20th *April*; and on the 21st, final judgment was signed by the plaintiff. On the 15th *May*, the costs were taxed at 109*l.* 8*s.*, and the execution issued on the 29th *May*. In support of the application, sections 46 and 50 of the Insolvent Debtors' Act, 7. Geo. 4, c. 57, were relied upon (a).

Talfourd, Serjt., and **Cleasby**, shewed cause. When the defendant filed his petition, the costs of the suit were not taxed, nor could they be, by the practice of the court; and therefore they did not amount to "a debt, or sum of money due, or claimed to be due," at the time of filing the petition, within the 46th section of the Insolvent Act; and the circumstance that the defendant had put down 200*l.* in the schedule as the probable costs of the suit, does not alter the case. In *Goddard v. Vanderheyden* (b), upon a similar question raised on

(a) Section 46 directs that it shall be lawful for the Court to adjudge that the prisoner shall be discharged, "as to the several debts and sums of money due or claimed to be due, at the time of filing such prisoner's petition, from such prisoner to the several persons named in his or her schedule as creditors or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of filing such petition, and which were not then payable; and as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid."

Section 50.—"That the discharge of any prisoner so adjudicated as aforesaid, shall and may extend to all process issuing from any court for any contempt of any court ecclesiastical or civil, for non-payment of money, or of costs, or expenses, in any court ecclesiastical or civil; and that, in such case, the said discharge shall be deemed

to extend also to all costs which such prisoner would be liable to pay in consequence or by reason of such contempt, or on purging the same; and that every discharge so adjudicated as aforesaid, as to any debt or damages of any creditor of such prisoner, shall be deemed to extend also to all costs incurred by such creditor before the filing of such prisoner's schedule in any action or suit brought by such creditor against such prisoner for the recovery of the same; and that all persons, as to whose demands for any such costs, money, or expenses as aforesaid, any such person shall be so adjudged to be discharged, shall be deemed and taken to be creditors of such prisoner in respect thereof, and entitled to the benefit of all the provisions made for creditors by this act; subject, nevertheless, to such ascertaining of the amount of the said demands, as may be had by taxation or otherwise, and to such examination thereof as is herein provided, in respect of all claims to a dividend of such insolvent's estate and effects."

(b) 3 *Wilson*, 270.

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the old bankrupt acts, it is said by the Court:—"In ejectment, there was a verdict, at the summer assizes, for the plaintiff, and nominal damages: afterwards, in that vacation, the defendant became bankrupt; and in *Michaelmas* Term following, the plaintiff signed a final judgment, and had costs *de incremento* then taxed, and allowed to him. Lord *Henley*, in a case *Ex parte Todd*, held these costs did not become a debt till the judgment, and were connected therewith, and that the plaintiff could not be permitted to prove the same as a debt under the commission." *Ex parte Charles (c)* decided that a verdict, in an action for a breach of promise of marriage, was not a good debt to support a commission of bankruptcy, founded on an act of bankruptcy between the verdict and judgment, thereby overturning *Longford v. Ellis (d)*. In *Buss v. Gilbert (e)*, it was held that a debt due on a judgment signed in an action for damages, after an act of bankruptcy committed by the defendant, and a commission issued thereon, was not discharged by the certificate, though the verdict was obtained before the bankruptcy. *Wilmer v. White (f)*, which arose on the construction of the Insolvent Act, is a still stronger case. There judgment had been signed against the defendant in replevin, for want of an avowry; and on the 28th *April*, the plaintiff's attorney delivered a bill of costs for 28*l.* 7*s.* 8*d.* On the 29th, the defendant was imprisoned by another creditor, when he petitioned the Insolvent Debtor's Court; and having inserted in his schedule the amount of the bill of costs, he was discharged. Afterwards, the plaintiff assessed the damages in the action, and executed a writ of *fi. fa.*; and the Court refused to set the execution aside, upon the ground that no debt was due from the insolvent to the plaintiff at the time of his first imprisonment, but a liability only existed to a claim for unascertained damages. The principle of that case is exactly applicable to the present; because, until the costs were taxed, the amount was altogether unascertained.

Bompas, Serjt., in support of the rule.—There is undoubtedly an analogy between the Bankrupt and Insolvent Acts; but in the latter, the 50th section expressly provides for a case like the present, and was probably inserted to prevent the hardship which would otherwise occur. The present case is within the express terms of that section.

TINDAL, C. J.—If this case rested upon the 46th section of the stat. 7 Geo. 4, c. 57, the defendant would not be entitled to his discharge. That section limits the benefit of the act to the several debts and sums of money due or claimed to be due at the time of filing the petition. But the question is, whether the 50th section of the statute is not applicable, for a wider range is there given to the operation of the insolvent's discharge. It first enacts that the discharge of every prisoner shall extend to all process for contempt of courts ecclesiastical or civil, and to all costs which the prisoner shall be liable to pay. There the sentence closes; and then the same words are again taken up: "and that every discharge so adjudicated, as to any debt or damages of any creditor," shall be deemed to extend to all costs incurred by such creditor, before the filing of the prisoner's schedule, in any action or suit brought by such creditor against such prisoner for the recovery of the same. It then

(c) 14 East, 197.

(d) H. Black. 29, n. (a).

(e) 2 M. & S. 70.

(f) 6 Bing. 291; 3 M. & P. 671.

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directs that the amount of the said demands shall be subject to being ascertained by taxation or otherwise. This seems to me to contemplate a case similar to the present, where the damages of an action had been assessed, but the costs had not been ascertained. This is the best and safest construction which I can give to the enactment; and the defendant is entitled to have this rule made absolute, he undertaking not to bring any action against the plaintiff.

PARK, J.—This is a new question. It is to be observed, that the 46th section is altogether silent upon the subject of costs; and it seems to contemplate cases of debts. Then the 50th section extends the benefit of the act. It provides, that the discharge of any prisoner *so adjudicated*—meaning in pursuance of the 46th section,—shall extend to attachments, and the costs consequent upon them; and the 46th section not having provided for the unascertained costs of actions, the discharge is also extended to all costs incurred in any action or suit brought by a creditor to recover a debt or damages. These costs being subjected to taxation, shews that the enactment was intended to apply to cases where the judgment in an action had been obtained, but the costs were not taxed. I agree that this rule should be made absolute.

GASELEE, J.—I am of the same opinion. *Wilmer v. White (g)* depended upon the 61st section of the statute, which was held not to apply to unliquidated damages accruing upon judgment by default.

VAUGHAN, J.—This is a remedial statute, and it ought to be liberally expounded. The legislature, having provided for debts and damages due in the 46th section, extends the operation of the discharge in the 50th section; and the costs being subjected to taxation, shews that a case similar to the present was contemplated. The 51st section also discharges the insolvent as to money payable by way of annuity; and it would appear that, in these sections, the legislature was considering how far they could prospectively relieve the insolvent.

Rule absolute.

(g) 6 Bing. 291; 3 M. & P. 671.

June 3.

YOUNG v. MURPHY.

In an action for a breach of promise of marriage, the defendant pleaded, first, that after the supposed promise, he received information that the plaintiff was an unchaste person, and had committed fornication with one A. B., which information was true; wherefore he refused to marry the plaintiff. *Secondly*, that after the supposed promise, he received information that the plaintiff had committed fornication with some person or persons, to the defendant unknown, and was pregnant with a child, which child he averred was subsequently born a bastard; wherefore he refused to marry the plaintiff.—*Held*, upon demurrer, that the pleas were good.

DEMURRER to pleas to a declaration for a breach of promise of marriage. The declaration alleged that the defendant had intermarried with one *Elizabeth Sherratt*. The defendant pleaded, secondly, that after the making the supposed promise and undertaking, in the declaration mentioned, and before his intermarriage with the said *Elizabeth Sherratt*, in the declaration mentioned, to wit, on the 31st day of *May*, 1834, he discovered and received information that the plaintiff was an immodest, lewd, unchaste, and immoral

person, and had committed fornication with one A. B., which information was true; wherefore he refused to marry the plaintiff. *Secondly*, that after the supposed promise, he received information that the plaintiff had committed fornication with some person or persons, to the defendant unknown, and was pregnant with a child, which child he averred was subsequently born a bastard; wherefore he refused to marry the plaintiff.—*Held*, upon demurrer, that the pleas were good.

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son; and being sole and unmarried, had had carnal intercourse with, and was carnally known by, and had committed fornication with one *Henry Penleaze*, of which the defendant had no notice, knowledge, or suspicion at the time of making the supposed promise and undertaking, in the declaration mentioned; and he further said, that the information he so received and had was true, and that the plaintiff was an immodest, lewd, unchaste, and immoral person; and being sole and unmarried, had, after the making of the said supposed promise and undertaking, in the declaration mentioned, and before his intermarriage with the said *Elizabeth Sherratt*, carnal intercourse with, and had been carnally known by, and had committed fornication with the said *Henry Penleaze*: wherefore the defendant refused to marry the plaintiff, and remained unmarried with the said *Elizabeth Sherratt*, as he lawfully might, for the cause aforesaid, and that he was ready to verify.

Third plea.—That after the making of the said supposed promise and undertaking, in the declaration mentioned, and before his intermarriage with the said *Elizabeth Sherratt*, he received information, and had notice, that the plaintiff, being so sole and unmarried, had committed fornication with some person or persons, to him the defendant, unknown, and was pregnant and had a child of a child likely to be born, and which was afterwards born a bastard, but of which he had no notice, knowledge, or suspicion at the time of making the said supposed promise and undertaking, in the declaration mentioned. And the defendant, in fact, said, that the plaintiff, being sole and unmarried, after the making of the said supposed promise and undertaking, in the declaration mentioned, and before the intermarriage of the defendant with the said *Elizabeth Sherratt*, had committed fornication with some person or persons, to the defendant unknown, and had become and was pregnant and had a child of a child likely to be born, and which was subsequently born a bastard: wherefore he, the defendant, did refuse to marry the plaintiff, and did not marry the said *Elizabeth Sherratt*, as he lawfully might, for the cause aforesaid; and that he was ready to verify.

Demurrer.—For that, although every plea ought to contain but one answer to the declaration, yet the defendant had endeavoured by his second plea to include two answers to the declaration, and to include therein two distinct matters of defence to the cause of action; inasmuch as, in one part of the said second plea, he had alleged that the plaintiff was an immodest, lewd, unchaste, and immoral person; and, in another part, that she, being sole and unmarried, had had carnal intercourse with, and had been carnally known by, and had committed fornication with the said *Henry Penleaze*; and also, for that the plaintiff could not traverse, or confess and avoid, either of those distinct answers to matters of defence without admitting the other of them, nor could she take issue upon any certain issue upon the said matters of defence; and also, for that the said plea tended to prolixity in pleading, and could not be answered by a single replication; also, for that the said allegation, contained in the second plea, by which it was alleged that the plaintiff was an immodest, lewd, unchaste, and immoral person, was bad; not sufficiently certain; nor did it give any conveyance to the plaintiff any sufficient or certain information or knowledge as to the manner in which the defendant intended to impeach her modesty, chastity, or morality, or upon what immodest, lewd, unchaste, or immoral conduct the plaintiff the defendant intended to rely, in support of that allegation; nor could the plaintiff, from such allegation, be in any way prepared to

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answer the said charge. And also, for that the said second plea did not sufficiently state or allege that the plaintiff was an immodest, lewd, unchaste, immoral person, because she had had carnal intercourse with, and been carnally known by, and committed fornication with the said *H. Penleaz*; or in any other separate and distinct causes or cause. And the plaintiff was, by the said second plea, left in uncertainty as to what particular charge of immodesty, lewdness, unchastity, and immorality the defendant meant to bring against her, by the allegation first above mentioned; and that the second plea was, in other respects, double, uncertain, informal, and tended to prolixity in pleading, and to several issues, and was against the rules of pleading. And also, for that the defendant had not stated or alleged in his said second plea, at what time or times the plaintiff committed fornication with the said *H. Penleaz*; as in the said second plea mentioned, although that allegation was a material one, and ought to have been stated with sufficient certainty of time.

As to the third plea; that although every plea ought to contain but one answer to the declaration, and ought to contain only one matter of defence, yet the defendant had endeavoured, by his third plea, to include two answers and matters of defence to the declaration; inasmuch as he had alleged that the plaintiff had committed fornication with some person or persons, to the defendant unknown, and then had gone on to allege, in the same plea, that the plaintiff had become and was pregnant and with child of a child likely to be born, and which was subsequently born a bastard, while a plea, containing either of the above allegations, would be a sufficient answer to the declaration; also, for that it was not alleged by whom the said plaintiff had become pregnant with the said child, or that the persons or person, by whose means she was so pregnant, were unknown to the defendant, or that such pregnancy was the result of the fornication so alleged to have been committed, as in the first plea; also, for that the defendant had not alleged, in or by the said third plea, with sufficient certainty, whether he intended to rely on the plaintiff's having committed fornication with one person only, or with more than one; but he stated in the alternative that she committed fornication with some persons or persons unknown to him; and also, for that defendant had not stated in his said third plea with sufficient certainty at what time such fornication was committed, or that the time when it was committed was unknown to him, although the committing of such fornication was a material fact, and ought to have been alleged with sufficient certainty as to time.

Joinder in demurrer.

Peacock, in support of the demurrer.—Both pleas are bad, on the ground of duplicity and a want of certainty. The allegation that the plaintiff was chaste, would of itself afford a sufficient answer to the action; but generality in pleading is not allowed. If a party published of another that he was a swindler, he would be compelled, in an action for the libel, to justify by setting out the facts specifically which constitute the charge. This must be done to give the plaintiff an opportunity of denying the facts; because he could not come to the trial prepared to justify his whole life. *J'Anson v. Stuart*. And that doctrine has been recognized in subsequent cases. *Holmes v. Catesby* (b); *Jones v. Stevens* (c). As to the third plea, suppose it to be

(a) 1 T. Rep. 748.
 (b) 1 Taunt. 543.

(c) 11 Price, 273.

untrue that the plaintiff was pregnant by a person unknown to the defendant, but that the defendant was himself the father of the child; then the plaintiff would be under a difficulty, if *de injuriâ* were replied to the whole plea; because the proper course would have been to confess and avoid one portion of the allegation.

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TINDAL, C. J.—In the cases which have been cited, the defendants, who had published libels, were wrong-doers. Here the defendant is put upon his defence. It seems to me that the general replication *de injuriâ* would put all the matters in issue. The plaintiff had better amend by taking issue on the pleas.

The plaintiff elected to amend accordingly.

COMPANY of PROPRIETORS of the CROSS KEYS BRIDGE v.
RAWLINGS and another.

June 7th.

CASE. The declaration stated, that the plaintiffs, after the passing of a certain act of Parliament, intituled "An Act, &c.," (the Cross Keys Bridge Act,) caused to be made and built a certain bridge and embankment, according to the provisions of the said act, over the New Cut or Channel, in the last-mentioned act named, and at the place in the same act mentioned; and also that the plaintiffs, before and at the time of the committing of the grievances by defendants, as thereafter mentioned, were lawfully possessed of their own property, by virtue and for the purposes in the said first-mentioned act specified, of the said bridge, (which said bridge was then so constructed as to admit the centre thereof to open at the top as a draw-bridge, for the purpose of permitting ships and other vessels, trading to and from the ancient sea-port town of *Wisbech*, to pass through at all times without striking any mast;—and, by virtue of a certain other act of Parliament, &c. (called the *Nene Outfall Act*.) That the defendants, before and at the time of committing the grievances thereafter mentioned, were then the owners and lawfully possessed of a certain vessel, there navigating and proceeding in and along the said New Cut or Channel; that the said bridge was opened for the purpose of allowing the said vessel of the defendants to pass through the said bridge; and the said vessel was then about to pass through the said bridge, and might have passed through the same without damaging or injuring the said bridge; yet the defendants, not regarding their duty in that behalf, whilst the said bridge of the plaintiffs was so opened for the purpose of allowing the said vessel to pass through the same, (to wit,) on, &c., took so little and such bad care, by the persons, the then servants of the defendants, then in charge and care of the said vessel, in the navigating, management, and direction of the same vessel, that the same, by and through the carelessness, negligence, mismanagement, and improper conduct of the persons, the then servants of the defendants, in that behalf, then in charge and care of the said vessel of the defendants, with great force and violence, run foul of and struck against the leaf and other parts of the said bridge, and thereby then destroyed, broke down, and greatly broke, damaged, and injured the same, and the same thereby and then became and was greatly injured, damaged, and destroyed; and also, by reason of the pre-

In an action on the case, for carelessly navigating a ship through the plaintiffs' bridge, where, by the bridge was injured, the defendant pleaded that the plaintiffs had wrongfully narrowed the channel, and increased the rapidity of the current, and thereby rendered the passage of vessels difficult and dangerous; *without this*, that the vessel struck the bridge through the carelessness of the defendants, with a conclusion to the country. *Held*, that, upon this issue, the defendants were entitled to shew that the injury had not been caused through their carelessness, although they had failed in proving any default on the part of the plaintiffs.

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mises, the plaintiffs had been forced and obliged to pay, lay out, and expend, and had necessarily laid out and expended a large sum of money, (to wit,) &c in and about the repairing the said damage so done to the said bridge as aforesaid; and also, by means of the premises, the plaintiffs lost and were deprived of the use of the said bridge, for a long space of time, (to wit,) from thence hitherto, and thereby the plaintiffs lost and were deprived of all the tolls, profits, and advantages which, during that time, they might and otherwise would have derive and acquired from the use of their said bridge, to the damage, &c.

Pleas.—First: That the said bridge, in the declaration mentioned, was not made or erected according to the provisions of the act of Parliament, in that behalf in the declaration first mentioned, *modo et forma*.

Second Plea.—That before the time of committing the supposed grievances, in the declaration mentioned, the plaintiffs had wrongfully, and without the knowledge of the defendants, placed large quantities of stones, and the same, at the time of the committing the said supposed grievances, were near to and around the piles and buttresses of the said bridge, through and between which said buttresses, vessels navigating the said channel were accustomed and ought to pass, and by means whereof the waterway or passage for vessels, between and through the said buttresses, was not only greatly contracted and narrowed, but also, by means of the premises, the rapidity of the current of the said channel, through and between the said buttresses, was greatly increased, and the navigation and management of vessels near and through the said bridge was thereby rendered difficult and dangerous. And the defendants further say, that in consequence of the said contraction and narrowness of the said waterway, and the said increased rapidity of the said current, occasioned as aforesaid, and without the default of defendants, the said vessel was, at the time of the committing of the supposed grievances, driven, compelled, and carried against the said leaf and other parts of the said bridge: *without this*, that the said vessel of the defendants ran foul of and struck against the said leaf and other parts of the said bridge, by and through the carelessness, negligence, mismanagement, or improper conduct of the persons, the then servants of the defendants, in manner and form as in the declaration is alleged. Conclusion to the country.

Issue was joined on both pleas.

At the trial, before *Park, J.*, at the last *Norwich* assizes, the first issue was clearly proved in favour of the plaintiffs. The defendants, in support of the second issue, then examined several witnesses to prove the inducement in the plea, but they altogether failed in establishing any default on the part of the plaintiffs; whereupon the defendants' counsel tendered evidence to shew that the injury had not been caused by the carelessness of the defendants. The learned judge rejected the evidence, and a verdict was found for the plaintiffs on both issues. *Storks, Serjt.*, obtained a rule *nisi* for a new trial, upon the ground that the evidence had been improperly rejected.

Kelly and Biggs Andrews shewed cause. The inducement stated in the plea was disproved at the trial; and the question is, whether the defendants were not bound to prove the whole of the plea. The whole of the allegations in the plea were in issue by the replication. [*Tindal, C. J.*—The defendants take the issue by their plea. If you were injured because the traverse was too nar-

row, you might have demurred.] The defendants put themselves upon the country upon the whole of the matter contained in the plea. In *Tuck v. Tooke* (a), where certain facts were alleged in a plea, which set forth that a bond was obtained and accepted by fraud and covin, it was decided that the defendant could not give evidence of any other fraud than that which was alleged in the plea. In *Stephen on Pleading* (b), it is said, "The general design of a special traverse, as distinguished from a common one, is to explain or qualify the denial, instead of putting it in the direct and absolute form." The plea in this case does not contain a general denial of carelessness, but of qualified carelessness, which it is therefore incumbent upon them to prove; otherwise there is no difference between a general and a special traverse. The plaintiffs do not say they were guilty of no carelessness at all; but the plea amounts to this—You, the plaintiffs, have caused an obstruction in the river, which has made more than the usual care necessary.

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Storks, Serjt., contrâ, was stopped.

TINDAL, C. J.—The whole difficulty in this case has arisen because the attention of the learned judge was not specifically directed at the trial to the state of the record. I feel no difficulty in deciding the case. The effect of a special traverse in pleading is the same now, as it was before the new rules, except that it must conclude to the country (c). Suppose, before the new rules, the plaintiffs had declared for an injury done to their bridge through the defendants' carelessness, and a special plea had been allowed, which stated that the plaintiffs, by their own wrong narrowed the waterway—*without this*, that the injury was caused by the defendants' carelessness; the plea would then have concluded with a verification, and the issue, when it was joined, would have only put the carelessness in issue. And it does not appear to me that the plea, now concluding to the country, makes any difference. The authorities upon this subject are collected in *Com. Dig.* "Pleader." G. 18, 19, 20.

I do not see how the plaintiffs are injured by this mode of pleading; because the defendants, by putting the matter of inducement on the record, plainly shew one of the grounds upon which they mean to rely, namely, that the plaintiffs had contracted the passage of the river. But as they were also entitled, under this plea, to prove that they had not been guilty of carelessness or mismanagement, the cause must go down for a new trial upon the second issue.

PARK, J.—I am of the same opinion. Upon looking at my notes, I am confident that my attention was not called to the special traverse.

GASELEN, J., concurred.

VAUGHAN, J.—The only question is, whether it was not material in this case to inquire whether the injury was caused by the carelessness of the defendants. The special traverse was the gist of the plea, and that denied the allegation of negligence which was set out in the declaration.

Rule absolute.

(a) 6 B. & Cress. 437; 4 Man. & R. 393.
 (b) 3rd ed. page 175.

(c) R. H. T. 4 W. 4.

LEUCKHART v. COOPER and another.

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June 13.

In trover, the defendant justified the holding of certain bales of wool, under an ancient custom used in the trade of public warehouse-keepers in *London*; for a general lien upon all goods housed in their warehouses for or in the name of the merchants or other persons by whom such warehouse-keepers were retained, for all monies, or any balances thereof, due from such merchants or other persons to such warehouse-keepers for or on account of any advances or expenses which such warehouse-keepers had made, or had been put to, in paying the duties and customs by law imposed and charged on goods consigned to such merchants and other persons from abroad; and in paying the freight and other charges, and the advances, charges, and claims which the warehouse-keepers should have made, or have been put to, for entering, landing, and warehousing said goods.—*Held*, upon motion after verdict, that this custom was unreasonable, and could not be supported.

TROVER, to recover certain bales of wool. The defendants justified the retaining and holding of eleven bales of wool, parcel, &c., under a plea that long before and at the time of the committing of the grievances in the declaration mentioned, the defendants were public warehouse-keepers, and the trade of public warehouse-keepers, during all the time aforesaid, exercised and carried on in the city of *London*; that in the course of exercising and carrying on the said trade or business of public warehouse-keepers, they the defendants were retained and employed by merchants and other persons of the city of *London* to enter at the Custom House, at and for the port of *London*, goods consigned from abroad, and afterwards to land such goods, and to house the same at and in the warehouses of the defendants, for and in the name of such merchants or other persons, subject to their order, for certain reasonable reward to the defendants in that behalf, they the defendants paying, if required by such merchants or other persons so to do, the duties and customs by law imposed and charged upon such goods consigned from abroad to *London*; and also paying, if required so to do by the said merchants or other persons, the freight and other charges payable in respect of the conveyance of such goods to the port of *London* aforesaid; that there was, and from time whereof the memory of man runneth not to the contrary, hath been and still is a certain ancient and laudable usage and custom in the trade of public warehouse-keepers in the city of *London*, for all public warehouse-keepers to have and be entitled to a general lien upon all goods from time to time housed or remaining in the warehouses of such public warehouse-keepers for and in the name of the merchants or other persons by whom such public warehouse-keepers are retained and employed as aforesaid, for all monies, or any balance thereof, remaining due from such merchants or other persons to such warehouse-keepers for or on account of any advances or expenses which such public warehouse-keepers have made or have been put to, in, and about paying the duties and customs by law imposed and charged on goods consigned to such merchants and other persons, from abroad, if required to do so as aforesaid, and in and about paying, if required so to do by the said merchants or other persons, the freight and other charges for the conveyance of such goods to the port of *London* aforesaid; and also for and on account of all and every the advances, charges, and claims which such public warehouse-keepers shall have made or have been put to, or to which they may be entitled, for and in respect of the entering, landing, and warehousing such goods at and to the warehouses of such public warehouse-keepers as aforesaid. That while the defendants were such public warehouse-keepers as aforesaid, to wit, on the 1st of *January*, 1833, and on divers times and occasions, between that day and the 10th of *October*, 1834, one *Edward Heilbron*, merchant in the city of *London*, received divers, to wit, 200 bales of wool, shipped and consigned from abroad; and that the said *Edward Heilbron*, on divers times and occasions during the time aforesaid, was possessed of divers, to wit, twelve bills of lading of the said wools, deliverable by the permission and consent of the plaintiff to order, whereby the said *Edward Heilbron* was enabled to, and did, on the times and

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occasions aforesaid, hold himself out as the true owner of the said last-mentioned wools; and the said *Edward Heilbron*, being so possessed of the said bills of lading, and being enabled to hold, and so holding himself out as the true owner of the said bales of wool afterwards, and on the said several times and occasions aforesaid, delivered the said bills of lading to the defendants, and then retained and employed the defendants to enter at the Custom House, at, and for the port of *London*, for the said *Edward Heilbron*, the said bales of wool in the said bills of lading mentioned and described, (of which bales of wool the said bales of wool in the introductory part of this plea referred to were part and parcel,) and afterwards to land the said wools, and house the same at and in the warehouses of the defendants for and in the name of the said *Edward Heilbron*, subject to his order, for certain reasonable reward to the defendants in that behalf, they the defendants paying the entries and customs by law charged and imposed on such goods; and the said *Edward Heilbron*, on the several times and occasions aforesaid, then requested the defendants to pay the duties, the freight, and other charges for the conveyance of the said wools to the port of *London* aforesaid. That, in pursuance of such retainer and employment, and believing the said *Edward Heilbron* to be the owner of the said wools, they, the defendants, as such public warehouse-keepers, did, on the several times and occasions aforesaid, accordingly enter at the Custom House, at and for the port of *London*, for and as the property of the said *Edward Heilbron*, the said wools, and did pay the duties and customs by law charged and imposed on such goods, and also the freight and other charges for the conveyance of such wools to the port of *London* aforesaid; and afterwards, to wit, on the several times and occasions, did land the said wools, and did house the same for and in the name of the said *Edward Heilbron*, at and in the warehouse of the defendants, subject to the order of the said *Edward Heilbron*. That the duties and customs, freight, and other charges, so advanced and paid by the defendants as aforesaid, for and in respect of the said wools and the other advances, charges, and claims which the defendants, as such public warehouse-keepers as aforesaid, made, were put to, and were entitled to, for, and in respect of the entering, landing, and housing the same wools as aforesaid, amounted in the whole to a large sum of money, to wit, the sum of 2,000*l.*, and that a great part thereof, to wit, the sum of 1,030*l.* 13*s.* 5*d.*, before the time of committing the said grievances, was due and owing from the said *Edward Heilbron* to the defendants, and still was due and unpaid to the defendants. That the defendants, as such public warehouse-keepers as aforesaid, on divers times and occasions during the time last aforesaid, did deliver the greater part of the said 200 bales of wool to the order of the said *Edward Heilbron*; and that the residue of the said wools, to wit, eleven bales thereof, being the said eleven bales of wool in the introductory part of this plea referred to, and parcel of the said wools in the declaration mentioned, before and at the time of the committing of the said several grievances, were and still are lying, being, and remaining in the warehouse of the defendants. That the defendants, as such public warehouse-keepers as aforesaid, by virtue and according to the said usage and custom of the trade of public warehouse-keepers in the city of *London* aforesaid, before and at the time of the committing of the said grievances, retained and held the said last-mentioned bales of wool, parcel, &c., as and by way of a general lien, for the said last-mentioned sum of 1,030*l.* 13*s.* 5*d.*, so due and owing from the said *Edward Heilbron*,

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and still unpaid to the defendants as aforesaid, which was the said conversion of the said eleven bales of wool, parcel, &c., in the introductory part of this plea referred to; and that the defendants were ready to verify, &c.

At the trial, before *Tindal*, C. J., at the *London* sittings after *Trinity* Term, 1835, the following facts were in evidence.—The plaintiff was a merchant in *Saxony*, and *Heilbron* was his correspondent and agent in *London*, who acted in a similar capacity for other foreign merchants. *Heilbron* had been accustomed to deposit goods which were consigned to him in the defendants' warehouses until they were sold; and he having died insolvent in *September*, 1834, the defendants claimed a lien upon the goods mentioned in the declaration, to the amount of 1,030*l.* 13*s.* 5*d.*, being the balance due to them from *Heilbron* for warehouse and other charges, as mentioned in the plea, upon various parcels of goods so deposited with them. A verdict was found for the defendants upon the second issue (a).

Wilde, Serjt., obtained a rule *nisi* to enter a verdict for the plaintiff *non obstante veredicto*, upon the ground that the custom stated in the plea was bad. He cited *Oppenheim v. Russell* (b); *Richardson v. Goss* (c); *Wright v. Snell* (d), and other cases.

Creswell and *R. V. Richards* shewed cause.—The custom which is stated in the plea is not illegal. The jury found that the custom had existed in *London* from time immemorial, and it is for the plaintiff to shew that it is unreasonable. In *His v. Gardiner* (e), *Coke*, C. J., said, "that if no reason could be given for the beginning of a custom, yet *non sequitur* the custom to be for this cause unreasonable, and against reason in the beginning of it; for that for some things no reason can be given, and the rule is *Qui rationem in omnibus querit, rationem destruit*." Nor is there anything in the custom to shew that it is not for the general convenience of trade that it should exist. *Oppenheim v. Russell* (b), and *Richardson v. Goss* (c), are distinguishable; because the question, as to the existence of a general lien, arose before the goods came into the hands of the purchaser. *Aspinall v. Pickford* (f) shews that a lien for a general balance may be set up by a carrier; and in *Rushforth v. Hatfield* (g) it was decided that, by the general usage of trade, such a general lien may be established, but it was not contended, in either of these cases, that such a custom would be unreasonable. In the present case, the custom is confined to *London*. The plaintiff consigned these goods to the factor, thereby giving him absolute power over them as owner; and in *George v. Clagett* (h), and other cases, it has been held, that where a factor sells goods without disclosing his principal, the purchaser has a right to pay the factor, or to set off a debt due from him. That is a very strong decision against the interests of foreign merchants, but the rule is, that they are bound to know and abide by the usages of the *English* law. In *Foster v. Pearson* (i), a very strong custom amongst bill-brokers was set up; and the judge directed the jury that parties might contract as they thought proper, and there the usage was established.

(a) See the pleadings in the case *Leuckhart v. Cooper*, 1 *Hodges*, 16; 1 *Bing. N. R.* 509; 1 *Scott*, 481; 3 *Dow. P. C.* 415; and the trial of the cause at *Nisi Prius*, 7 *Car.* & *P.* 119.

(b) 3 *Bos. & Pul.* 42.

(c) 3 *Bos. & Pul.* 119.

(d) 5 *B. & A.* 350.

(e) 2 *Bulstrode*, 195.

(f) Cited in *Oppenheim v. Russell*. *Bos. & Pul.* 44. n. (a).

(g) 6 *East*, 519.

(h) 7 *T. Rep.* 359.

(i) 1 *Cr. M. & R.* 849.

Atcherley, Serjt., and W. H. Watson, contrd.—The situation of wharfingers and carriers differs from that of a warehouseman; because the former have a duty cast upon them to receive and carry goods. Therefore none of the cases which have been cited are applicable to the rights of warehouse-keepers. And in all the cases, where a right of lien has been given for a general balance, the question arose between the wharfinger and the owners of the goods. In *Rushforth v. Hatfield* (i), Lord Ellenborough, C. J., said that it was not for the convenience of the public that these liens should be extended further than they were already established by law. It is not alleged in the plea that *Heilbron* held himself out as being the owner of the goods; and therefore this is an attempt to establish the custom, although the warehouse-keeper may know that the goods belong to a third person. Nor had *Heilbron* any authority to make such a contract with the defendant. In *George v. Clagett* (j) the defendant supposed that the factor was the owner of the goods when he made the purchase. *Wright v. Snell* (k) is a direct authority to shew that a general lien is not sustainable by a carrier against the owner of the goods for a general balance due from the factor. In that case, *Holroyd, J.*, observes, "I am of opinion that the mere act of consigning goods to another, cannot give to a third person any right to retain the goods of the consignor until the payment of the debt of the consignee. It is clear that the mere possession of the factor does not give him a title to deal with the goods beyond the authority given to him: he may sell, but he cannot pledge. Now, if he could not pledge these goods to the carrier, as a security for his debt by any subsequent agreement, how can he do it in this case, in consequence of any prior, express, or implied agreement? I am of opinion that he cannot, by any agreement, either express or implied from his course of dealing, subject the property of his consignor and employer to the payment of his own debts; nor can he authorize these defendants to retain the goods as a pledge and security for the money owing by him."

In *Maass v. Henderson* (l), Lord Kenyon, C. J., said that if an agent disclose his principal at the time, it is clear that he cannot pledge the property of such principal to another with whom he is dealing for his own private debt. In another class of cases, it has been held that an usage for carriers to retain goods as a lien for a general balance, does not affect the consignor's right of stoppage *in transitu*. *Oppenheim v. Russell* (m). And such a custom, as is here claimed, would be in contravention of the Factors' Act, 6 G. 4, c. 94.

Cur. adv. vult.

TINDAL, C. J.—The jury having found a verdict in this case for the defendants, upon the issue raised upon the second plea, the plaintiff has moved for judgment *non obstante veredicto*. The question therefore is, whether the custom stated in that plea, is a custom that can be supported in law. The plea justified the retaining and holding of eleven bales of wool, parcel of the quantity claimed in the declaration, under an ancient custom, from time immemorial used in the trade of public warehouse-keepers in the city of London, for all such public warehouse-keepers to have and be entitled to a general lien upon all goods from time to time housed or remaining in their warehouses, for and in

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(i) 7 East, 229.

(j) 7 T. Rep. 359.

(k) 5 B. & Ald. 360.

(l) 1 East, 335.

(m) 3 Bos. & Pul. 42.

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the name of the merchants or other persons by whom such public warehouse-keepers are retained or employed, for all monies, or any balance thereof, due from such merchants or other persons to such public warehouse-keepers for or on account of advances or expenses which such public warehouse-keepers should have made or been put to, in, or about the paying of duties or of customs on goods consigned to them from abroad, or the payment of freight and other charges for the conveyance of such goods to the port of *London*, or the entering, landing, and warehousing such goods. So that the general lien claimed is not confined to goods the property of the person who employed or retained the warehouse-keeper, but extends to all goods which are put by him in his own name into the hands of the warehouse-keeper, whether his property or not. The custom set up in the plea, if supportable, would make the goods of a foreign merchant, which have been consigned to a *London* factor for sale, and by him put into the warehouse of the warehouse-keeper for safe custody, liable to a private debt of the factor, for expenses incurred in respect of other goods of third persons which had been in his hands at former times, for charges contracted upon such goods during any antecedent period of time, and that to an unlimited extent. It appears to us that such a custom is at once unreasonable and unjust, and therefore bad in law. It is a custom which is obviously prejudicial in a direct manner, and in a very high degree to foreign trade; for no foreign merchant would be content to consign his goods to this country for sale, if they could be made liable, whilst warehoused for the purpose of custody, to satisfy a debt already due from the factor to the warehouse-keeper in respect of other goods. No authority whatever has been cited in support of this custom, and as far as any analogy can be drawn from decided cases, it is against its validity.

The case of *Oppenheim v. Russell* (n) establishes the principle, that, although a common carrier may have acquired, by usage or special agreement, a lien for a general balance of account between him and a consignee, this lien shall not affect the right of the consignor to stop *in transitu*: that is, in effect, that this right of general lien shall not operate upon or against the rights of third persons. And the doctrine laid down in *Wright v. Snell* (o) bears still more closely upon the point now under discussion, a general lien being held not sustainable by a carrier against the true owner of the goods, for the general balance due from the factor to whom the goods were consigned for sale. That case, in effect, decides the present; for no sound distinction can be taken in this respect between a public warehouse-keeper and a public carrier, except, indeed, that the latter stands in a position more favoured by the law, in respect to lien, than the former; the carrier being obliged by law to receive and carry the goods, whilst the warehouse-keeper's claim arises out of a voluntary contract. And the present case appears to us to differ from that of *George v. Clagett* (p), principally relied on by the defendants. In that case, the owner put his goods into the hands of his factor to sell as his own: the factor sold them as his own, and the defendant had no knowledge that the factor was not the real owner of the goods: in such case, the set-off of the debt due from the factor to the purchaser, followed as a necessary consequence from the sale by him as of his own goods.

(n) 3 Bos. & Pul. 42.
(o) 5 B. & Ald. 350.

(p) 7 T. R. 359.

But, in this case, there was no sale by the factor: but the proposition contended for is, that the goods became, by the operation of the custom, pledged for the factor's debt, though the factor was not authorized by law so to pledge them directly. And although the factor may now, under some circumstances, pledge, the facts of the present case do not bring it within the operation of the statute, 6 G. 4, c. 94. It is unnecessary, as a further objection to the custom set up by this plea, to observe that it is pleaded so largely as to comprehend all goods put into the hands of a warehouse-keeper by a factor in his own name, whether or not the warehouse-keeper has knowledge or notice that they are not the property of the factor, but of the foreign merchants. But, without relying on this objection, we think the custom unreasonable, and therefore bad, upon the more general ground above stated; and therefore give our judgment for the plaintiff, *non obstante veredicto*.

Judgment for the plaintiff.

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TALFOURD, Serjt., obtained a rule *nisi*, in *Michaelmas* Term, calling upon the defendants to shew cause why the plaintiffs should not be at liberty to sign and enter up final judgment against the defendant for 4694*l.* 15*s.* 7*d.*, being the sum specified in the certificate of the Right Honorable *James Abercrombie*, the speaker of the House of Commons. The affidavits upon which the rule was obtained verified the speaker's certificate, which was to the following effect:—

“Whereas *John Rickman*, Esquire, clerk assistant of the House of Commons, and *George Boone Roupell*, Esquire, one of the masters of the High Court of

mittee was appointed in the mode required by the statute; and if the appointment of the committee takes place under circumstances where the statute does not allow the appointment to be made, or in a manner contrary to or inconsistent with the essential requisites prescribed by the statute, there is no court at all, and the whole proceedings take place *coram non iudice*.

2. Sec. 2 of the 9 Geo. 4, c. 22, directs that whenever a petition complaining of the undue election of a member of Parliament shall be presented, a day and hour shall be appointed for taking the same into consideration, and notice in writing shall be given by the speaker to all parties, and where the conduct of the returning officer is complained of, to the returning officer; and by sec. 36 it is enacted, that, in certain cases, the House shall determine whether the returning officer shall be allowed to strike in reducing the committee. A petition was presented against the return of the members, and it complained incidentally of misconduct and partiality in the returning officers:—*Held*, that the returning officers were not called upon, as original parties to the petition, to appear before the House; and that, even if they were held to be included within the petition, they had no power, under the statute, to interfere in striking the committee.

3. Where the returning officers appeared before the committee, but, in the report nothing was decided as to whether the charge against them was frivolous or vexatious, *Held*, that this omission did not avoid the whole report.

4. Sec. 5 of the statute directs that no proceedings shall be had upon any petition, unless the person or persons subscribing the same, or some one or more of them, shall personally enter into a recognizance, according to the form thereunto annexed, for the payment of all costs which shall become due to any witness summoned in behalf of the person or persons so subscribing such petition, or to any party who shall appear before the House, or any committee of the House, in opposition to such petition. A petition was presented, signed by three persons, one of whom entered into the recognizance, which was drawn in the form of the schedule, by which he undertook to pay all costs which should become due to any witness summoned on his behalf, or to any party who should appear before the House:—*Held*, that the recognizance was not open to any objection which affected it in substance or legal operation.

5. The certificate of the speaker is conclusive evidence as to the amount of the costs for which the verdict is to be entered up; and the Court has no power to try the propriety of the allowance, or the principle upon which it was conducted.

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Chancery, who were duly authorized and directed by me, in pursuance of an act passed in the ninth year of the reign of his late Majesty King *George* the Fourth, intituled 'An Act to consolidate and amend the Laws relating to the trial of controverted Elections or Returns of Members to serve in Parliament,' to examine and tax the costs and expenses incurred by *Robert Gill Ransom*, *Richard Crawley*, and *Henry Haken*, the persons who signed a petition, complaining of an undue election and return for the borough of *Ipswich*, have reported to me the amount thereof.

"I do hereby certify, that the costs and expenses allowed in the said report amount to the sum of 4694*l.* 15*s.* 7*d.* And I do further certify, that *Robert Adam Dundas* and *Fitz Roy Kelly*, Esquires, whose opposition to the said petition was declared by the select committee appointed to try and determine the merits of the said petition, to be frivolous and vexatious, are liable to pay the same. Given under my hand the 27th day of *October*, 1835.

(Signed) "J. ABERCROMBIE, Speaker."

The affidavit of Mr. *Gainsford*, the plaintiffs' attorney, set forth, that, under a power of attorney from the plaintiffs, he had personally demanded the said sum of 4694*l.* 15*s.* 7*d.* from the defendants, but that the sum had not been paid. The affidavit of *David Thomas Harris* stated, that writs of summons in an action of debt had been issued against the defendants; that they did not appear according to the exigency of the writs, and that appearances were thereupon entered in pursuance of the statute; and that, on the 20th of *November*, a declaration was filed against the defendants, of which they had received notice (a).

In *Easter* Term, 1836, cause was shewed against this rule. (b) The following documents were referred to in the affidavits made on behalf of the defendants:—

On the 25th *February*, 1835, a petition was presented to the House of Commons by the plaintiffs, *Robert Gill Ransom*, *Richard Crawley*, and *Henry Haken*. The petition alleged that the plaintiffs were entitled to vote; and that *Robert Adam*

(a) The declaration stated, that the defendants, on the 2nd day of *November*, 1835, were indebted to the plaintiffs under and by virtue of a certain act of Parliament made and passed in the sixth year of the reign of his late Majesty King *George* the Fourth, to consolidate and amend the laws relating to the trial of controverted elections or returns of members to serve in Parliament, in the sum of 4694*l.* 15*s.* 7*d.*, for the costs and expenses incurred by the plaintiffs in prosecuting a certain petition of the said plaintiffs complaining of an undue election and return of the said defendants as burgesses to serve in Parliament for the borough of *Ipswich*, and which said sum was to be paid by the defendants to the plaintiffs on request; whereby, and by reason of the non-payment thereof, and by virtue of the said act, an action hath accrued to the plaintiffs to demand and have of and from the defendants the said sum of 4694*l.* 15*s.* 7*d.*, to the plaintiffs damage of 10*l.*, &c. And therefore, &c.

(b) The rule nisi was as follows: "Upon reading a certificate under the hand of the Right Honourable *James Abercrombie*, the speaker of the House of Commons, dated the 27th day of *October* last; the affidavit of *Francis Stratford*, verifying the same; the affidavit of *William Skeet*, with a power of attorney thereto annexed, under the hands and seals of all the plaintiffs in this cause, and dated the 2nd day of *November* instant; the affidavit of *Edward Barnevelt Eliot Gainsford*, gentleman, and the affidavit of *David Thomas Harris*; and, upon hearing counsel for the plaintiffs, it is ordered, that the defendants, upon notice of this rule to be given to them or their attorney, shall shew cause to this court, on the fifth day of next *Hilary* Term, why the plaintiffs should not be at liberty to sign and enter up final judgment against the said defendants for the sum of 4694*l.* 15*s.* 7*d.*, the sum specified in the said certificate, pursuant to the statute 9 Geo. 4, c. 22, sec. 63.

By the Court, &c.

Dundas, Esq., and Fitz Roy Kelly, Esq., the defendants, and James Morrison, Esq., and Rigby Wason, Esq., were candidates to represent the borough of *Ipswich* at the then last election of members to serve in Parliament for that borough. That the bailiffs of the said borough are the returning officers, and that *John Chevalier Cobbold* and *Henry Bristo* were such bailiffs and returning officers at the said election. That divers persons were admitted to vote, and did vote, at the said election for the said defendants, who were not duly registered as electors to vote at the said election. That divers persons were admitted to vote, and did vote, at the said election for the said defendants or one of them, who had not, at the time they so voted, the same qualification for which their names had been originally inserted in the register of voters then in force for the said borough. That divers persons who were registered as electors for the said borough became disqualified to vote as electors at such election, subsequently to the period of the list of electors being revised and signed for the purpose of such registry, and previously to their so voting, by receiving alms or parish relief, or by not residing within the said borough, or within seven miles thereof or any part thereof, or by other legal or personal disqualifications and incapacities; and they and divers other persons who had no legal right to vote, were nevertheless admitted to vote, and did vote, at the said election for the said defendants, or one of them; that divers persons were admitted to vote, and did vote, at the said election for the said defendants, who were disabled or disqualified from or incapable of voting at the said election by reason of their having been, within twelve months previously to such election, concerned or employed in charging, collecting, levying, or managing duties of excise, customs, or other duties or revenues, or in some other office or employment. That divers persons were permitted to vote, and did vote, at the said election for the said defendants, who were, or had been, either during such election or within six calendar months previous to such election, or within fourteen days after it was completed, employed at such election as counsel, agent, attorney, poll-clerk, flagman, or in some other capacity for the purposes of such election, and had, either before, during, or after such election, accepted or taken from the said candidates, or some or one of them, or from some other person, for or in consideration of, or with reference to, such employment, a sum or sums of money, or a retaining fee, office, place, or employment, or a promise or security for a sum or sums of money, or a retaining fee, office, place, or employment. That divers persons were admitted to vote, and did vote, at the said election for the said defendants who had asked, received, and taken money, or other reward, by way of gift, loan, or other device, or had agreed or contracted for money, gift, office, employment, or other reward, to give their votes to the said defendants, or one of them, and to refuse or forbear to give their votes to the said *James Morrison* and *Rigby Wason*, or either of them; and divers persons were admitted to vote, and did vote, at the said election, who, by themselves, or persons employed by them, did, by gifts or rewards, or by promises, agreements, or securities for gifts or rewards, corrupt or procure, or attempt to corrupt or procure, persons to give their votes for the said defendants, or one of them, or to forbear to give their votes to the said *James Morrison* and *Rigby Wason*, or either of them. That all such persons who were so admitted to vote, and did vote, as aforesaid, and divers other persons who voted at the said

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election for the said defendants, or one of them, were disabled or disqualified from voting, or incapable or unqualified or incompetent to vote at the said election.

That divers persons who were duly registered as electors at the said election, and who were entitled to vote at such election, claimed to vote thereat for the said *James Morrison* and *Rigby Wason*, or one of them, at the proper polling places, and were illegally and improperly excluded from voting by the said returning officers. That the said *Henry Bristo*, after receiving the writ for the said election, and previously to and during such election, and particularly in respect to the taking the poll at such election, *was guilty of great and undue partiality in favour of the said defendants*, and as well before as after the receipt of such writ, canvassed many of the electors in company with or on behalf of the said defendants, or one of them, and solicited and recommended several electors to vote for them, or one of them, and prevailed upon several electors to vote for the said defendants or one of them, or to forbear to vote for the said *James Morrison* and *Rigby Wason*, or either of them, and otherwise improperly interfered with the freedom of the election. That the said returning officers rejected as false and illegal divers votes which were tendered at the said election for the said defendants and for the said *James Morrison* and *Rigby Wason*, or some or one of them; and that the said *Henry Bristo*, finding, at the close of the poll, that more votes had been so tendered for the said defendants than the said *James Morrison* and *Rigby Wason*, did admit and place such votes upon, or add such votes to, or cause the same to be placed upon or added to the poll, after the close of such poll, or after the legal and proper time for closing the same had expired; and did also improperly and illegally insert, or cause to be inserted, upon the said poll, without the concurrence and contrary to the desire of the said *John Chevalier Cobbold*, several votes which ought not to have been so inserted thereon, and did otherwise illegally and improperly alter the said poll; and the said returning officers did, in casting up the said votes on the said poll, knowingly and wilfully reckon many votes so illegally and improperly placed on the poll, and did not declare the true and real state of the poll as it stood at the final close thereof. That after the place in Parliament to be supplied by such election became vacant, and as well before as after the teste or issuing out of the writ for the said election, and at and during the said election, the said defendants did, by themselves, and by their agents, friends, and partisans, by divers ways and means, at their and each or one of their charge and behalf, directly and indirectly, give, present, and allow to persons having votes at such election, money, meat, drink, lodging, entertainment, provision, and reward, and did make presents, gifts, rewards, promises, agreements, and obligations, and engagements to give money, meat, drink, provision, reward, and entertainment, to and for persons having votes as aforesaid, and to and for the use or advantage, benefit, enjoyment, profit, and preferment of such persons, in order that they, the said defendants, might be elected, and for being elected to serve in Parliament for the said borough. That before and at and during the said election, the said defendants were, or one of them was, by themselves and by their agents, guilty of divers acts of bribery and corruption, in order to corrupt and procure, and did, by themselves, and by their agents, friends, managers, and other persons employed in their behalf, by gifts, presents, money, rewards, and promises, and agreements and securities for money, gifts, and rewards, and by threats, intimidation, promises, un-

due influence, and other corrupt, illegal, or improper practices, acts, and means, corrupt and procure divers persons having or claiming to have votes at such election, to give their votes in favour of the said defendants, and to forbear to give them in favour of the said *James Morrison* and *Rigby Wason*. That the said defendants, by the said corrupt and illegal practices, were and are, and each of them was and is, wholly disabled and incapacitated and ineligible to serve in this present Parliament for the said borough of *Ipswich*, and the return of the said defendants was and is wholly null and void; and that the said returning officers had notice of and were informed, and well knew, of such corrupt and illegal conduct and practices, which were also well known to the electors, and notorious in the said borough. That by the several illegal ways and means aforesaid, the said defendants obtained a colourable majority of votes over the said *James Morrison* and *Rigby Wason*, and procured themselves to be returned to serve for the said borough; whereas the said *James Morrison* and *Rigby Wason*, and each of them, had a legal majority of votes at the said election, and were duly elected, and ought to have been returned to serve in this Parliament for the said borough. Petitioners prayed the House to take the premises into consideration, and to declare the said election and return of the said defendants wholly null and void, and that they are not, nor ought to be deemed, members to serve in Parliament for the said borough of *Ipswich*, and that the names of the said defendants might be erased from the said return, and that the said *James Morrison* and *Rigby Wason* might be declared duly elected to serve in Parliament for the said borough, and that the names of the said *James Morrison* and *Rigby Wason* might be substituted in the said return; and that the House would grant to the petitioners such relief as to the House should seem meet.

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On the day on which the petition was presented, it was ordered to be taken into consideration on the 26th of *March*.

Notice of this order was served on the sitting members and petitioners only.

The speaker, on the 25th of *February*, by writing under his hand, nominated and appointed *John Rickman*, Esq., clerk assistant of the House of Commons, and *Francis Cross*, Esq., one of the masters of the High Court of Chancery, to examine into the sufficiency of the sureties named or to be named in the recognizance entered into by one or more of the persons subscribing the said petition, pursuant to 9 G. 4, c. 22, and to report to him their judgment upon the sufficiency of such sureties.

On the 7th of *March*, the petitioner *Ransom* entered into the following recognizance:—

“Be it remembered, that, on the 7th day of *March*, in the year of our Lord 1835, before me, the Right Honourable *James Abercrombie*, speaker of the House of Commons, came *Robert Gill Ransom*, and acknowledged himself to owe to our sovereign lord the king the following sum, that is to say, the sum of 1000*l.*, to be levied on his goods and chattels, lands and tenements, to the use of our said sovereign lord the king, his heirs, and successors, in case the said *Robert Gill Ransom* shall fail in performing the condition hereunto annexed. The condition of this recognizance is, that if the the said *Robert Gill Ransom* shall well and duly pay all costs and expenses and fees which shall be

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due and payable from the said *Robert Gill Ransom* to any witness who shall be summoned to give evidence in his behalf to any clerk or officer of the House of Commons, upon the trial of the petition signed by the said *Robert Gill Ransom*, complaining of an undue election or return for the borough of *Ipswich*; and if the said *Robert Gill Ransom* shall also well and truly pay the costs and expenses of the party who shall appear before the House in opposition to the said petition, in case the said *Robert Gill Ransom* shall fail to appear before the House at such time or times as shall be fixed by the House for taking such petition into consideration, or in case the said *Robert Gill Ransom* shall withdraw his said petition by the permission of the House, or in case the select committee appointed by the House to try the matter of the said petition shall report to the House that the said petition appears to them to be frivolous or vexatious; then this recognizance to be void; otherwise, to be of full force and effect.

"7th March, 1835.

ROBERT GILL RANSOM."

On the same day, *Jeremiah Head* and *William May*, as sureties for the said *Robert Gill Ransom*, entered into a recognizance with the same condition. On the 9th of March, the examiners appointed by the speaker certified in writing that *Head* and *May* were sufficient sureties in that behalf.

Mercurii 10 die Junii, 1835.

Mr. *Patrick Maxwell Stewart*, from the select committee appointed to try and determine the merits of the petition, complaining of an undue election and return for the borough of *Ipswich*, informed the House that the committee had determined

"That *Robert Adam Dundas* and *Fitz Roy Kelly*, Esquires, are not duly elected burgesses to serve in this present Parliament for the borough of *Ipswich*. That the last election for burgesses to serve in this present Parliament for the borough of *Ipswich* is a void election. That the petition of *Robert Gill Ransom*, *Richard Crawley*, and *Henry Haken*, did not appear to the said committee to be frivolous or vexatious. That the opposition to the said petition, by the said *R. A. Dundas* and *Fitz Roy Kelly*, Esquires, did appear to the said committee to be frivolous and vexatious. That the committee have altered the poll, by striking off the names of *Richard Bantoft*, *Horatio Bockham*, *John Cox*, *Thomas Etherington*, *James Hayward*, *Herman Gullen*, *Abbott Lord*, *Samuel Osborn*, *Lawrence Squire*, *Robert Smith*, *Jephtha Waller*, *Abraham Wolsey*, and *Robert Barber*, who were put upon the poll after the termination of the election; and also the names of *Frederick Hewes* and *James Martin Howard*, who were employed at such election by the sitting members; and also the names of *John Brown*, *King Garnham*, *George Horatio Coe*, *Arthur Bott Cooke*, *Edward Bolton Finch*, and *William Coe Abbott*, who were proved to have been guilty of bribery at such election. That *R. A. Dundas* and *Fitz Roy Kelly*, Esquires, were, by their friends and agents, guilty of bribery and corruption at the late election for the borough of *Ipswich*; and that *Arthur Bott Cooke*, *John Bury*, *John Pilgrim*, and others, were guilty of bribery at the said election. That *John Bury*, *John Bond*, *Arthur Bott Cooke*, *R. B. Clamp*, and *John Pilgrim*, were guilty of absconding, to avoid being served with the speaker's warrant; and that *John Eddowes Sparrowe* and *John Clipperton*, the avowed agents of the sitting members, and *William Peters*, aided and abetted

them in keeping out of the way to avoid giving their evidence before this committee. That the said *John Pilgrim*, having at length been served with the chairman's warrant, was prevented attending this committee by being arrested on a charge of embezzlement, made against him by Messrs. *Sewell* and *Blake*, under very suspicious circumstances. That the conduct of the magistrates, *Samuel Bignold* and *Edward Temple Booth*, Esquires, before whom the said *John Pilgrim* was charged, appears to this committee to be a breach of the privileges of this House."

On the 11th *August*, the petitioners' agents addressed the following requisition to the speaker.

IPSWICH PETITION.

"SIR,

"In consequence of the committee, to whom the matters of this petition were referred, having declared the opposition thereto frivolous and vexatious, we take the liberty of sending to your secretary, herewith, the bill of costs of the petitioners, and request you will be pleased to order that the same may be referred to the proper officers for taxation, as provided for by the statute 9 G. 4, c. 22, s. 60.

"We have the honour to be,

(Signed) "ASHURST and GAINSFORD.

"To the Right Honourable the Speaker."

The following direction was thereupon issued by the speaker :

"By virtue of the powers given to the Speaker of the House of Commons by the act referred to in the requisition hereunto annexed, I do hereby direct *John Rickman*, Esq., clerk-assistant of the House of Commons, and *George Boone Roupell*, Esq., one of the masters of the High Court of Chancery, to examine and tax the costs and expenses mentioned in the said requisition ; and the said *John Rickman* and *George Boone Roupell*, Esquires, are to report to me the amount thereof.

"Given under my hand the 11th day of *August*, 1835.

"J. ABERCROMBIE, Speaker."

On the 1st *October*, the examiners certified as follows :

"In pursuance of the within-recited order of the Right Honourable the Speaker of the House of Commons, dated the 11th day of *August* last, we, the examiners thereby appointed, do certify that in obedience thereto, we have examined and taxed the bill and expenses mentioned in the said order. And we do hereby report to the Right Honourable the Speaker of the House of Commons that the costs and expenses allowed by us, on such taxation, amount to the sum of 4,694*l.* 15*s.* 7*d.* And we further report, that *R. A. Dundas* and *Fitz Roy Kelly*, Esquires, whose opposition to the petition of *Robert Gill Ransom*, *Richard Crawley*, and *Henry Haken*, appeared to the select committee, appointed to try and determine the merits of the said petition, to be frivolous and vexatious, are liable to pay the same.

(Signed)

"G. B. ROUPPELL,

"JOHN RICKMAN.

"To the Right Honourable the Speaker."

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The speaker signed the following certificate :

" Whereas *John Rickman*, Esq., clerk-assistant of the House of Commons, and *George B. Roupell*, Esq., one of the masters of the High Court of Chancery, who were duly authorized and directed by me, in pursuance of an act passed in the 9th year of the reign of his late Majesty, King George the Fourth, intituled ' An Act to consolidate and amend the Laws relating to the Trial of controverted Elections or Returns of Members to serve in Parliament,' to examine and tax the costs and expenses incurred by *John Gill Ransom*, *Richard Crawley*, and *Henry Haken*, the persons who signed a petition, complaining of an undue election and return for the borough of *Ipswich*, have reported to me the amount thereof. I do hereby certify, that the costs and expenses allowed in the said report amount to the sum of 4,694*l.* 15*s.* 7*d.* And I do further certify, that *Robert A. Dundas* and *Fitzroy Kelly*, Esquires, whose opposition to the said petition was declared, by the select committee appointed to try and determine the merits of the said petition, to be frivolous and vexatious, are liable to pay the same.

" Given under my hand the 27th day of *October*, 1835.

(Signed) " J. ABERCROMBIE, Speaker."

The following is the substance of the affidavits, upon which cause was shewn.

Messrs. *Cobbold* and *Bristo*, the returning officers, stated in their affidavit that they never received, or heard, or knew of any notice in writing from the speaker of the House of Commons, or from any other person on his behalf, of the day and hour appointed by the said House for taking the petition of the plaintiffs into consideration, or of any other order to attend the House at the time appointed, save and except the speaker's warrant to appear at the bar of the House : a copy of which was referred to in the affidavit (a). That having understood that they were charged by the said petition with having illegally and improperly excluded divers persons from voting at the said election, and other misconduct, they appeared before the committee, by counsel, on the 15th of *April*, 1835, when such charges against them were proceeded with, and witnesses called to establish them on the part of the petitioners ; and that the said

(a) " Whereas, by an order of the House of Commons, the matter of the petition of *Robert Gill Ransom* and others, complaining of an undue election and return for the borough of *Ipswich*, is appointed to be taken into consideration by the said House upon *Thursday*, the 26th day of *March* instant, at three of the clock in the afternoon :—

These are therefore to require you, *Henry Gallant Bristo* and *John Chevallier Cobbold*, and each of you, to bring in your custody the poll-books containing the names of those who polled at the last election for members to serve in Parliament for the borough of *Ipswich*, and also the lists of voters for the said borough, signed by the barrister appointed to revise the same, and in force at the last election ; and also the contracts or estimates, and original drawings or plans, furnished to you or either of you by the architect or any other person employed by you in the erection of polling booths for the purpose of taking the poll at the said elec-

tion ; and also the original bills delivered to you by the several tradesmen employed by you or either of you in the erection of such polling booths, and also the receipts for any monies paid by you to any person on account thereof ; and also, that you *Henry Gallant Bristo* do bring in your custody a certain letter, addressed to you and written by *Fitzroy Kelly*, Esq., bearing date the 26th day of *January* in this present year, and received by you on the following day, and therewith to be and appear at the bar of the House of Commons upon the 26th day of *March* as aforesaid, to receive and obey such further order as the said House, or the select committee then to be appointed to try the matter of the said petition, shall make concerning the same, as you will answer the contrary at your peril.

Given under my hand the 4th day of *March*, 1835.

" J. ABERCROMBIE, Speaker."

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committee resolved that there was no ground whatever for such charges against them; and so resolved without calling upon their counsel for any defence.

Mr. *J. F. Impey* deposed that he had searched the office of the secretary of the speaker of the House of Commons, and found therein the recognizance entered into by *Ransom* and his sureties: a true copy of which was annexed to his affidavit (*b*).

Mr. *Clipperton*, the defendants' agent, stated in his affidavit, that the petition was presented on the 25th *February*, 1835: a true copy of which was annexed (*c*). That the petition was ordered to be taken into consideration on the 26th *March*: on which day a select committee was appointed. That the several allegations of the petition, upon which evidence was tendered, were the following:—1st. A charge of personal bribery against the defendants. 2ndly. A similar charge of bribery by the agents and friends of the defendants. 3rdly. That *James Morrison*, Esq., and *Rigby Wason*, Esq., had a legal majority of votes, and ought to have been returned. 4thly. A charge of undue and partial conduct on the part of the returning officers. That in support of the first-mentioned allegation, several witnesses were examined at great length on behalf of the petitioners. That nevertheless the evidence entirely failed to establish the truth of the said allegation; and in the report subsequently presented to the House, no imputation of bribery was made against the defendants. That the third allegation was, after a protracted scrutiny, abandoned by the petitioners; and that the committee did not report to the House that the said *Morrison* and *Wason* had a legal majority of votes. That the last of the above-mentioned allegations was, after the hearing of evidence tendered in support of it on the part of the said petitioners, expressly negatived by the said committee; and that the said committee, without calling upon the returning officers to make any defence, on the 15th day of *April*, agreed to the following resolution:—"That it was the opinion of the committee that no *animus* of an improper nature had been proved against the returning officers." That on the 10th day of *June*, (which was the last day of their sitting,) the committee presented to the House, through their chairman, their report; a true copy of which report was annexed to the affidavit (*d*), and also informed the House that they had come to the following among other resolutions:—"That it appears to this committee that *Robert Adam Dundas* and *Fitzroy Kelly*, Esquires, were, by their friends and agents, guilty of bribery and corruption at the late election for the borough of *Ipswich*; and that *Arthur Bott Cook*, *John Bury*, *John Pilgrim*, and others, were guilty of bribery at the said election." That the said committee did not make any other report to the said House than the said report above-mentioned. That previous to, during, and after the sittings of the said committee, deponent was retained and employed by and on the behalf of the said defendants as their agent. That the said committee, on the 27th *March* last past, actually met, and proceeded upon the said petition during about thirty-nine or forty days; and that several days were occupied in investigating and trying the said charges, contained in the said petition, of personal bribery by the said defendants; and the said committee was also occupied

(*b*) See the recognizance, *ante*, p. 159.

(*d*) See the report, *ante*, p. 160.

(*c*) See the petition, *ante*, p. 156.

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about a fortnight of the said time in the scrutiny of votes, in order to determine whether Messrs. *Morrison* and *Wason* had the legal majority, and ought to have been returned, as alleged in the said petition : but, although about one hundred votes for the late members were objected to by the petitioners, the counsel finally gave up that part of the case, leaving both the defendants with a majority, and without calling upon the defendants to disqualify any of the votes for Messrs. *Morrison* and *Wason*, to which they the said defendants had objected. That the said committee also proceeded in investigating and trying the said charge in the said petition of undue and partial conduct in the said returning officers, or one of them. That the returning officers' opposition to the said charge, and their defence thereto, was made and conducted on their behalf, before the said committee, by their own counsel, acting on their particular and express behalves, and so recognized by the said committee ; that part of the petition, relating to the returning officers, not being opposed by the defendants, nor the defendants' counsel being heard upon it ; and the said committee resolved as aforesaid, that the charge was unfounded. That after ten days and upwards had been occupied in the proceedings upon the scrutiny of the votes, the petitioners, by their counsel, informed the committee that they abandoned that part of the petition which alleged that the said *James Morrison* and *Rigby Wason* had a majority of legal votes, and which prayed for their return. That on the 15th day of *August* last, deponent received a notice to attend the taxation of the petitioners' bill of costs from the agents of the petitioners. That the said agents of the petitioners, at the same time, caused to be delivered, at the office of deponent, a certain paper writing, or bill of costs, purporting to be the bill of costs mentioned in the requisition hereinafter next mentioned : a copy of which was annexed to the affidavit. That on the 11th of *August*, the said agent to the said petitioners transmitted to the speaker of the House of Commons the letter or requisition annexed to the affidavit, together with the said bill of costs ; and that the said speaker did make his order of reference, referring the said bill for taxation to *John Rickman* and *George Boone Roupell*, Esquires, as examiners (e). That a very large portion of the amount of the said bill, amounting, as deponent believed, to 3,000*l.* and upwards, was charged therein for and in respect of monies, costs, charges, and expenses, purporting to have been incurred by the petitioners in respect of the said allegations contained in the said petition of improper conduct in the said returning officer, of personal bribery by the said defendants, and of the allegation that the said Messrs. *Morrison* and *Wason* had a legal majority of votes at the said election. That in pursuance of the said notice, hereinbefore mentioned, deponent attended from time to time, before the said examiners, on behalf of the said defendants, for the purpose of taxing the said bill ; and that, previously to proceeding upon such taxation, deponent protested against the authority or jurisdiction of the said examiners to tax the said bill at all, as against the said defendants ; and further protested against such parts being allowed or taxed as were charged in the said bill, in relation to the prosecution of the several last-mentioned parts of the said petition, which the said petitioners had themselves abandoned ; and also against those parts of the said bill being taxed or allowed which the said committee had either expressly negatived, or had not reported to have been established : that is to say, 1st, the

(e) See the requisition and order of reference, *ante*, p. 161.

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charge of personal bribery against the said defendants; 2ndly, the allegation that the said *James Morrison, Esq.*, and *Rigby Wason, Esq.*, had a legal majority of votes at the said election, and ought therefore to have been returned instead of the said defendants; and 3rdly, the charge of undue and partial conduct of the returning officers of the said borough, or one of them, at the said election. That on subsequent occasions, and during the taxation of the bill, deponent, by himself, and through counsel, on behalf of the said defendants, urged before the said examiners such protest. That the said examiners nevertheless did tax, as against the said defendants, the several costs and charges alleged to have been incurred by the said petitioners in supporting the three last-mentioned allegations. The affidavit then pointed out objections to specific charges which appeared in the bill of costs. It concluded by setting out a copy of the report of the examiners, upon which the certificate of the speaker was founded (f). In a supplemental affidavit, Mr. *Clipperton* deposed that he had searched the official records of orders made in the House of Commons, and that the orders, made prior to the nomination and appointment of the *Ipswich* petition, were as follows:—

“ IPSWICH ELEKCTION PETITION,

“ 25^o *Februarii*.

“ Ordered,

“ That the petition be taken into consideration upon *Thursday*, the 26th day of *March* next, at three of the clock in the afternoon:” which order was minuted as follows:—

Date of order.	Subject matter.	Date of delivery.	Managers to whom delivered.
25th <i>February</i> .	<i>Ipswich</i> petition.—Sitting Members. do. do. Petitioners.	27th.	<i>W. Cook</i> .

“ Ordered,

“ That Mr. Speaker do issue his warrant or warrants for such persons, papers, and records, as shall be thought necessary by the several parties, on the hearing of the matter of the said petition.”

Sir *J. Campbell, A. G., Wilde, Serjt., Sir W. Follett, Humfrey, and Wrangham*, shewed cause.—A select committee appointed by the House of Commons, in pursuance of stat. 9 Geo. 4, c. 9, is a tribunal of a limited authority; and if any defective or excessive exercise of its powers can be shewn, this Court will not give the summary remedy to enforce the speaker's certificate which is sought for by this rule under the 63rd section (g). In *Bruyers*

(f) See a copy of the examiner's report, ante, p. 161.

(g) Section 63.—“ And be it enacted, that it shall and may be lawful for the party or parties entitled to such costs and expenses, or for his, her, or their executors or administra-

tors, to demand the whole amount thereof, so certified as above, from any one or more of the persons respectively, who are hereinbefore made liable to the payment thereof in the several cases hereinbefore mentioned; and in case of non-payment thereof, to re-

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v. Halcomb (b), it is said, that the Court would have been unwarranted in issuing process to give effect to the speaker's certificate, unless it saw that his certificate was founded on a proceeding legal, by act of Parliament, and in compliance with those general principles of justice which are binding on all jurisdictions; that if this were otherwise, the speaker's certificate that A. owed B. a sum of money, without more, would authorize, nay, compel the Court to issue execution against B. to seize his goods and throw him into prison. *Strachey v. Turley (c)*, is a case to the same effect; and in several other cases the Court has looked into the statute to satisfy itself that its provisions have been observed. *Margrave v. White (d)*, *Trueman v. Lambert (e)*, *Ex parte Williams (f)*, *Gurney v. Gordon (g)*.

The first objection to the present application is, that the select committee was not legally appointed, because the returning officers did not receive notice to appear and to assist in striking the committee. The petition contained an allegation of misconduct against the returning officers, and the statute clearly shews that they were parties to the proceedings. As they were not made parties, the committee was never properly constituted, and all the proceedings took place *coram non judice*. By sec. 2 (*h*), the returning officers were entitled to receive notice of the day and hour when the petition would be taken into consideration; and by sec. 34 they might have interfered in striking the committee (*i*). By reason of the omission to give these privileges to the

cover the same by action of debt in any of his majesty's courts of record at *Westminster*, in which action it shall be sufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them in the sum to which the costs and expenses ascertained in manner aforesaid shall amount by virtue of this act; and the certificate of such amount, so signed as aforesaid by the speaker, shall have the force and effect of a warrant to confess judgment; and the court in which such action shall be commenced shall, upon motion, and on the production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate, for the sum specified therein to be due from the defendant or defendants in such action, in like manner as if the said defendant or defendants had signed a warrant to confess judgment in the said action to that amount."

(*b*) 5 Nev. & Man, 149; 1 Har. & Wol, 410; 3 Ado. & Ellis, 381.

(*c*) 7 East, 507. 11 East, 194.

(*d*) 8 Barn. & Cress. 412.

(*e*) 4 M. & Sel. 234.

(*f*) 8 Price, 3.

(*g*) 9 Bing. 37; 2 M. & Scott, 187; 2 Cr. & J. 614; 3 Tyr. 616.

(*A*) Section 2.—"And be it enacted, that whenever a petition complaining of an undue election or return of a member or members to serve in Parliament, (or complaining that no return has been made to any writ issued for the election of any member or members to serve in Parliament on or before the day on which such writ is made returnable, or, if such writ be issued during any session or prorogation of Par-

liament, that no return has been made to the same within fifty-two days after the day on which such writ bears date, or that any return is not according to the requisition of the writ, or complaining of the special matters contained in any such return,) shall be presented to the House of Commons within such time as shall be from time to time limited by the House, a day and hour shall be appointed by the said House for taking the same into consideration, and notice thereof in writing shall be forthwith given by the speaker to all parties so petitioning, and to the sitting members, and to any parties who may have petitioned to be permitted to defend any such election or return; and, where no return has been made or the special matter of the return, or the conduct of any returning officer is complained of, to the returning officer or officers, accompanied with an order to the parties to attend the House at the time appointed, by themselves, their counsel, or agents."

(*i*) Section 34.—"And be it enacted, that if the returning officer or officers by whom any return ought to have been made, or has been made, shall attend the House when any petition complaining of any undue election or return or omission to make a return is ordered to be taken into consideration, in consequence of such order and notice as hereinbefore described; and in case there shall be more petitions than one presented on distinct interests, or complaining upon different grounds, the House shall determine, from the nature of the case, whether the returning officer or officers, his or their counsel or agents, shall, together with such petitioners, be entitled to strike off from the list of members drawn by lot in the manner

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returning officers, a most material prejudice has arisen to the defendants. It is true that the returning officers appeared before the committee by their counsel, but that will not cure a defect in the formation of the committee. If the charge against the returning officers had been declared frivolous and vexatious, then they were entitled, by sec. 60, to receive costs from the petitioners. It will be contended, on the other side, that these directions as to the rights of the returning officers are merely directory; but that is not so, but they are of the essence of the whole proceeding. In *Rex v. Lordale (k)*, Lord Mansfield, C. J., said, "there is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely directory."

Secondly. The recognizance entered into by the petitioners was defective in two particulars. First, by sec. 5 (*l*) it is directed that a recognizance shall be entered into for the payment of all costs which shall become due to any witness summoned in behalf of the *person or persons* subscribing the petition. The petition presented to the House was signed by three persons, but the recognizance was entered into by *Ransom* alone, and he became bound to pay "all costs which shall be due and payable *from him* to any witness who shall be summoned to give evidence *in his behalf*." This, therefore, is not the recognizance required, or even sanctioned, by the act; and as it is directed by sec. 5, that no proceedings shall be had upon any petition, unless the person or

hereinbefore directed in cases where there shall be more than two parties before the House, or whether such list shall be reduced by the parties severally presenting such petitions only; and if such officer or officers cannot be found to be served with such notice or order, or, being served, shall not appear by himself or themselves, his or their counsel or agents, at the day and time appointed for taking such petition into consideration, the House may permit or authorize any person to appear in the stead of him or them, and in like manner shall decide whether the person so nominated or appointed to appear in the place of such returning officer or officers shall be entitled to strike off from the said list of thirty-three members so drawn by lot as aforesaid, as it might do in case the returning officer or officers had appeared."

(*k*) 1 Burr. 447.

(*l*) Section 5.—"And be it enacted, that no proceeding shall be had upon any such petition, unless the person or persons subscribing the same, or some one or more of them shall, within fourteen days after the same shall have been presented to the House, or within such further time as shall be limited by the House personally enter into a recognizance to our sovereign lord the king, according to the form hereunto annexed, in the sum of 1000*l.*, with two sufficient sureties, in the sum of 500*l.* each, or four sufficient sureties in the sum of 250*l.* each, for the payment of all costs, expenses, and fees which shall become due to any witness summoned in behalf of the person or persons so subscribing such petition, or to any clerk or officer of the House, upon the trial of such petition, or to any party who

shall appear before the House, or any committee of the House, in opposition to such petition, in case such person or persons shall fail to appear before the House at such time or times as shall be fixed by the House for taking such petition into consideration; or in case such petition shall be withdrawn by the permission of the House, or in case such committee shall report to the House that such petition appears to them to be frivolous or vexatious; and if, at the expiration of the said fourteen days, such recognizance shall not have been entered into, or shall not have been received by the speaker of the House of Commons, or the time for entering into or receiving such recognizance shall not previously have been enlarged, the speaker shall report the same to the House, and the order for taking such petition into consideration shall thereupon be discharged, unless, upon special report of the examiners into the sufficiency of the sureties, or upon matter specially stated and verified upon oath to the satisfaction of the House, the House shall see cause either to enlarge the time for entering into such recognizance, or to allow the names of any such sureties to be changed; and whenever such time shall be so enlarged, or name of any such surety shall be changed, the order for taking such petition into consideration shall, if necessary, be postponed, so that no such petition shall be taken into consideration till after such recognizance shall have been entered into and received by the speaker; provided always, that the time for entering into such recognizance shall not be enlarged more than once, or for any number of days exceeding thirty, nor the name of any proposed surety be more than once changed."

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persons subscribing the same shall enter into the recognizance which is required, the recognizance is altogether void; and it is as if no recognizance at all was entered into. Suppose *Ransom* died, or refused to continue the proceedings, then the other petitioners would carry on the inquiry; but costs subsequently incurred would not be within the meaning of the condition of the recognizance, because they would not be incurred on behalf of *Ransom*. If there were three joint prosecutors, and one died, and the two survivors afterwards subpoenaed witnesses, it would be obviously absurd to say, that these were witnesses called on behalf of the party who was dead. Another objection to the recognizance is, that it is only conditioned for the payment of the costs of the parties "who shall appear before the House," whereas sec. 5 directs, that it should also provide for the costs of parties who should appear before "any committee of the house." By sec. 10 and 12, voters may become a party before a committee to oppose or defend a return. Now these are parties who are not before the House at all, but are only before the committee. In this very case, the returning officers never appeared before the House, but they were before the committee. In either of these cases the recognizance would not be applicable to secure the payment of the costs of such parties. The enacting clause must be considered as imperative; and although the form of recognizance given in the statute may have been followed, that does not affect the question. In *Morgan v. Brown* (m), which was decided during the present term in the King's Bench, it was held, that where a statute gives a magistrate summary jurisdiction, and authorizes him to fine and imprison a party convicted, he cannot impose a joint fine on two defendants; and in that case the conviction which was held bad, had been drawn up in the very words of the form in the schedule. *Res v. Jarvis* (n).

Thirdly. The report of the committee is defective, because it is silent as to the charge made against the returning officers. The committee were bound to report whether the petition, as it related to the conduct of the returning officers, was frivolous and vexatious. Sec. 40(o) directs, that the committee shall report to the House whether the petition did or did not appear to them to be frivolous or vexatious, and in like manner report with respect to every party who shall have appeared before them in opposition to such petition, whether the opposition of such party did or did not appear to them to be frivolous or vexatious. The payment of costs, by sec. 57 and 58, is made to

(m) Since reported 1 Har. & Wol. 717.

(n) 1 Burr. 154.

(o) Section 40.—"And be it enacted, that every such select committee shall try the merits of the return or election or both, and shall determine, by a majority of voices of such select committee, whether the petitioners or the sitting members, or either of them, be duly returned or elected, or whether the election be void, or whether a new writ ought to issue, which determination shall be final between the parties, (except as is hereinafter provided for,) to all intents and purposes; and the House, on being informed thereof by the chairman of the said committee, shall order the same to be entered in their journals, and give the necessary directions for confirming or altering the return, or for ordering a return to be made, or for issuing a new writ for a new election, or for carrying

the said determination into execution as the case may require; and every such committee, at the same time that they inform the House of their final determination on the merits of the petition which they were sworn to try, shall also report to the House whether such petition did or did not appear to them to be frivolous or vexatious, and in like manner report with respect to every party who shall have appeared before them in opposition to such petition, whether the opposition of such party did or did not appear to them to be frivolous or vexatious; and if no party shall have appeared before them in opposition to such petition, they shall then report to the House whether such election or return or such alleged omission of a return as shall be complained of in such petition, (according as the case may be,) did or did not appear to them to be vexatious or corrupt."

depend entirely upon the finding of the committee as to this point; and if they had observed the directions contained in the statute, the costs of the appearance of the returning officers would not have been cast on the sitting members. This omission makes the report bad altogether. It is clear, that the returning officers were parties complained against. *Trueman v. Lambert* (p). If an award omits to determine any part of the matters in dispute, the whole award is avoided. *Mitchell v. Staveley* (q), *Winter v. White* (r).

Fourthly. The certificate includes costs, which ought not to have been included, because they are unauthorized by the statute.

If this court should have no jurisdiction to inquire into the *amount* of the costs, it may inquire into their *nature*. Here it is obvious that costs are included which the speaker had no jurisdiction to award against the defendants. Therefore the certificate is void, and the defendants may now take the objection that there was a want of jurisdiction. *Holt v. Meddowcroft* (s). The petitioners were only entitled by sections 58 and 60 (t) to the costs incurred in prosecuting the petition, but many of the charges which were allowed do not come within that description. The costs of the whole inquiry are given as against the defendants, although the report of the committee was in favour of the petitioners only on one of the allegations contained in the petition. The costs of the petition as to the returning officers are included, although the defendants did not in any way interfere in that part of the proceedings. There are likewise costs incurred after the report, and the costs of the taxation.

Talfourd, Serjt., Hill, and C. Austin, contrd.—The proceedings of the House, the committee, and the taxing officers, are not examinable, for the jurisdiction of this court is confined to giving effect to the speaker's certificate. The statute provides certain machinery whereby to attain the true result of an election; and after the proceedings have taken place, the speaker's certificate as to the payment of costs is conclusive. The statute points out a certain

(p) 4 M. & S. 234.

(q) 16 East, 58.

(r) 2 B. Moore, 723. 1 Brod. & B. 350.

(s) 4 M. & S. 467.

(t) Section 60.—“ And be it enacted, that the costs and expenses of prosecuting or opposing any petition presented under the provisions of this act, and the costs, expenses, and fees which shall be due and payable to any witness summoned to attend before such committee, or to any clerk or officer of the House of Commons, upon the trial of any such petition, shall be ascertained in manner following, that is to say, that on application made to the speaker of the House of Commons, within three months after the determination of the merits of such petition, by any such petitioner, party, witness, or officer, as before-mentioned, for ascertaining such costs, expenses, or fees, the speaker shall direct the same to be taxed by two persons, of whom the clerk or one of the clerks assistant of the House shall always be one, and one of the following officers, not being a member of the House, shall be the other, (that is to say,) masters in the High Court of Chancery, clerks in the Court of King's Bench, prothonotaries

in the Court of Common Pleas, and clerks in the Court of Exchequer, and the persons so authorized and directed to tax such costs, expenses, and fees, shall and they are hereby required to examine the same, and to report the amount thereof, together with the name of the party liable to pay the same to the speaker of the said House, who shall, upon application made to him, deliver to the party or parties a certificate, signed by himself, expressing the amount of the costs, expenses, and fees allowed in such report, together with the name of the party liable to pay the same; and the persons so appointed to tax such costs, expenses, and fees, and report the amount thereof are hereby authorized to demand and receive for such taxation and report, such fees as shall be from time to time fixed by any resolution of the House; and such certificate, so signed by the speaker, shall be conclusive evidence of the amount of such demands in all cases and for all purposes whatsoever; and the witness, officer, or party claiming under the same shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same.”

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course of proceeding after a petition against the return of a member is presented. The speaker is directed to appoint a day and hour for striking the committee. Are all the proceedings to be held void, if the speaker appointed a day without naming an hour, although the parties might have duly attended? The argument on the other side must go to that extent, and shew that the slightest deviation from the course pointed out would render all the proceedings void. It is a monstrous proposition to say that the statute shews a long chain of conditions precedent, and that if only one link be broken—even if an excess of one shilling be found in the taxation of costs—that the whole proceedings are void.

There is no analogy between a decision of a committee of the House of Commons and that of a limited or inferior court. The latter are under the care and superintendence of the superior courts, who interfere by their writs of mandamus, certiorari, prohibition, or quo warranto, and if their authority be not obeyed, an attachment will issue. But it will not be contended, that any court has such a power to interfere with the House of Commons. Suppose the speaker had refused to allow the recognizances which were entered into to be examined; what remedy could the defendants have obtained from this court? The House has carefully preserved its jurisdiction as to the right of determining on disputed elections, which is one of the most important of its privileges, by directing the manner in which the inquiry shall proceed; nor does it part with its authority until the costs are taxed. Then, the House having no power to compel the payment of money, it is directed that the costs shall be recovered in one of the courts at *Westminster*. The previous proceedings are not brought before this court, and therefore cannot be inquired into. From the time of the Restoration, no court has assumed the power to review the proceedings of the House of Commons; and the statute upon which this application is founded affords no evidence of an intention to surrender any of its privileges. It would be an infraction of the *ninth* article in the Bill of Rights if all the proceedings may be questioned. It is there declared, "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." In 4 Inst. 15, it is said, "that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere." 1 Black. 163. *Regina v. Paty* (u). It is quite clear, that the legislature never contemplated that such a proceeding as the present should be allowed. Here affidavits are filed by the defendants which the plaintiffs have had no opportunity to answer; and garbled statements are made with a view to raise an impression that justice was not done between the parties. *Clipperton's* affidavit stands unsupported by other testimony, and the printed proceedings which were published by order of the House are not referred to in his affidavits, although all the facts of the case are there stated in detail. *Bruyers v. Halcomb* (x) is the only case where the proceedings of the House have been examined in a court of law, and there the attention of the Court was not called to the consequences now pointed out; nor did the defendant in that case waive any irregularities by appearing before the Committee. In *Strachey v. Turley* (y), the objection appeared on the face

(u) 2 Lord Ray. 1105.

(y) 7 East, 507.

(x) 1 Har. & Wol. 410; 3 Adol. & E. 381; 5 Nev. & Man. 149.

of the certificate. In *Ex parte Williams* (z), the Court of Exchequer had an equitable jurisdiction over recognizances, independent of the statute; and in *Trueman v. Lambert* (a), Lord Ellenborough, C. J., said, that the committee was a court, not only of competent, but of exclusive jurisdiction.

With respect to the particular objections raised in this case, if the Court have power to entertain them, they are not maintainable. The statute is merely directory, and does not present a number of conditions precedent which are essential to the validity of the speaker's certificate; and if they were conditions, they have been, in substance, complied with.

The returning officers were not parties to the proceedings, nor were they entitled to assist in striking the committee. The misconduct of the returning officers was only incidentally complained of in the petition. The 36th section is only applicable where there is only one petitioner, or, at all events, where he is the only person petitioned against. If the returning officers had received notice to appear, it would have conferred no benefit upon the defendants.

The objection to the form of the recognizance admits of a clear answer. The recognizance is drawn in the very words of the schedule which is annexed to the statute; and the legal effect of it is to make the party answerable for all costs which should become due to witnesses examined in support of the petition: whether the witnesses were called by *Ransom* or the other petitioners would make no difference. *Morgan v. Brown* (b) was decided upon the ground that a fine could not be inflicted on two persons without distinguishing how much was to be paid by each.

With respect to the objection that the recognizance does not provide for costs incurred before the committee, the answer is, that the statute only provides for costs which are incurred by parties to be admitted parties by the House: and by the 10th and 12th sections it is by the authority of the House that other parties are allowed to appear before the committee; and if the objection were a good one, it would apply to every case where the recognizance was drawn according to the form in the schedule; because, in every case, it is uncertain whether there will not be new parties appearing before the committee. At all events, any irregularity in the form of the recognizance has been waived by the conduct of the parties. The time for objecting upon this ground was when the order of the day was proceeded with under sec. 17. If a party does not take objections to matters of form in the first instance, it is too late to do it afterwards; as in objections to juries. *Brunskill v. Giles* (c), *Hill v. Yates* (d), *Dovey v. Hobson* (e), *Rex v. Hunt* (f), *London Railway Company v. Sheriff of Surrey* (g). In a criminal case, if a party appears, he cannot object there was no summons. *Rex v. Stone* (h). And in treason, where a prisoner is entitled to a copy of the indictment, it is too late to object to a variance between a copy and the indictment, after he has pleaded. *Cooke's case* (i), *Watson's case* (k). And according to the civil law, all objections to the jurisdiction must be taken in the first instance. *Cujatius*, cap. 33, 18 lib.

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(z) 8 Price, 3.

(a) 4 M. & S. 234.

(b) 1 Har. & Wol. 717.

(c) 9 Bing. 13.

(d) 12 East, 229.

(e) 6 Taunt. 460. 2 Marsh. 154.

(f) 4 B. & Ald. 430.

(g) 4 Nev. & Man. 458.

(h) 1 East, 649.

(i) 13 Howell's State Trials, 330.

(k) Ibidem, 495.

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Potier, Code de Procedure, art. 1029. 1031. 173. 168, 169, 170. The law of Scotland is to the same effect.

It is objected, that the returning officers are not mentioned in the report of the committee. That might be a good objection if urged by the returning officers; but it affords no excuse to the defendants. As to the argument that the defendants ought not to pay the costs incurred by the appearance of the returning officers, the answer is, that the committee had no power to divide the costs; and the report of the committee shews that the serious offence of bribery was committed at the election, and they declared the opposition to the petition to be frivolous and vexatious, which inflicted the payment of costs. All the costs arose out of one proceeding, which was rendered necessary by the misconduct of the sitting members.

With the taxation of the costs this court has nothing whatever to do. They have been taxed by officers appointed in pursuance of the statute. By sec. 60 it is emphatically declared "that such certificate, so signed by the speaker, shall be conclusive evidence of the amount of such demands in all cases and for all purposes whatsoever." This certificate is good upon the face of it; and the Court is bound to enforce it for the full amount which it certifies to be due.

Cur. adv. vult.

June 11th.

TINDAL, C. J.—The question before us in this case arises upon an action of debt brought upon the 63rd section of the statute 9 Geo. 4, c. 22, to recover the costs and expenses occasioned by the trial of a petition before a select committee of the House of Commons, complaining of the undue election and return of members for the borough of *Ipswich*. The plaintiffs, under the section above referred to, obtained a rule drawn up on reading the certificate signed by the speaker, and proof of the demand of the costs, and refusal, which called on the defendants to shew cause why the plaintiffs should not be at liberty to sign and enter up final judgment against the defendants for the sums specified in such certificate. On shewing cause against this rule, the defendants have urged various objections against the certificate, and have contended, that, upon the authority of the case of *Bruyeres v. Halcomb* (a), the certificate of the speaker in the present case ought to be held by us as altogether void. In that case, the Court of King's Bench held, that the committee appointed for the trial of the petition was appointed in a state of things which required that the committee should not have been appointed; that it was a committee which had no authority over the petitioner; and that the report of such a committee, which was the sole foundation upon which the speaker's certificate rested, was a report which they had no power to make. In the judgment of the court, upon the facts before them, we entirely concur.

A select committee appointed in the mode required by the statute is the court which is to exercise the jurisdiction given by the statute; and if the appointment of the committee takes place under circumstances where the statute does not allow the appointment to be made, (which was the state of facts before the Court of King's Bench,) or in a manner contrary to or inconsistent with the essential requisites prescribed by the statute, there is no court at all. The whole of the proceedings take place *coram non jndice*; the jurisdiction fails altogether; and with the jurisdiction the whole of the superstructure built upon it by the statute falls to the ground also. *Debile fundamentum*

(a) 5 Nev. & Man. 140. 1 Har & Wol. 410. 3 Adol. & Ellis, 381.

fallit opus. The question, therefore, in the present case will be, whether any of the objections urged in argument before us, are objections which essentially touch the constitution of the court, or the legality of its proceedings; or whether, at most, they extend any farther than to the non-observance of certain directions to be found in the statute as to the course of its proceedings. For whilst, in the one case, as well upon the necessary construction of the statute as in conformity with the decision of the Court of King's Bench, we should be bound to hold the certificate absolutely void; in the other, notwithstanding a failure in the observance of matters not essential, but directory only, we should be equally bound to uphold it, and to give it effect. That the plaintiffs made out a *prima facie* case by their affidavits setting forth the certificate of the speaker, the demand of the costs, and the refusal to pay, was admitted in the course of the argument. But it is contended, that the facts disclosed in the affidavits filed on the part of the defendants, form an answer to the application; and, more particularly, that upon four distinct grounds of objection, the certificate of the speaker must be held altogether void. The first objection which has been urged before us goes to the legality of the appointment of the select committee. It has been contended that the returning officers were parties within the meaning of the statute, and, as such, entitled to notice in writing of the time of taking the petition into consideration, and to an order of the House to attend at the bar, and to be present at and assist in striking the committee; and that, by reason of the omission of such notice and order, and of the returning officers not attending as parties in the present case, the constitution of the committee was defective from its very foundation. In the next place it has been objected, that the recognizance entered into for the petitioners was essentially defective, and that, by reason of such defect, all the subsequent proceedings became void. In the third place, that the report of the committee is void, inasmuch as it contains no finding upon the charge made against the returning officers, nor upon the opposition to such charge, whether the same were respectively frivolous and vexatious, or the reverse. And, lastly, that costs are included within the certificate which are unauthorized by the statute, and some, even, which have accrued at a time subsequent to the report itself.

Now, as to the first objection, we are not prepared to say, that if, under the circumstances existing at the time, the House had no authority by the statute to constitute the court, the appearance of the defendants before such court, and their acquiescence in its subsequent proceedings, from the commencement of such proceedings down to their termination, could have the effect of setting up a jurisdiction which was in its original formation null and void; although, at the same time, we cannot but observe the inconvenient consequences which must follow if an objection to the jurisdiction, known at the time to exist, and which, in ordinary cases, is always held to come too late if not made in the very first instance, should, in this case, be allowed to prevail, after the termination of the contest is known to be adverse to the parties, who now stand on the objection;—a consideration which should, at least, induce us to pause and to weigh scrupulously the grounds upon which the original objection is founded, and to require it to be made out clearly and distinctly that the proceedings are absolutely void, before we can be justified in refusing to give them their full effect. And this observation comes with greater force when the objection is made on the part of the sitting members, not on the part of the returning officers; of the sitting members who were at the bar of the House, and present at all

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the proceedings, who made no objection to the course pursued by the House, and, indeed, received a benefit, not an injury, by the mode adopted in striking the committee, inasmuch as they had a greater advantage in reducing the number of the committee, than they would have been entitled to if the returning officers had been allowed to assist therein. The whole strength of the first objection appears to us to depend on one single inquiry, viz., whether the returning officers, upon the proper construction of the statute, are to be considered as a party having power to assist in striking the committee. If they were a party, having such power, and by the course taken were not allowed to exercise it, then the committee must be held to have been improperly constituted; if they had no such power, the whole weight of the objection falls to the ground. For, as to the mere want of notice from the speaker, or of an order on the returning officers to attend at the bar of the House, if they had no power of interfering, when there, with the choice of the committee, such omission can be considered as an omission to comply with a matter directory only, and not essential to the legal constitution of the court. The petition in this case, which was signed by the three plaintiffs, claiming on behalf of themselves and others a right to vote for members for the borough of *Ipswich*, prayed only "that the House would declare the election and return of the sitting members wholly null and void, and that they are not, nor ought to be deemed to be members to serve in Parliament for the borough of *Ipswich*, and that the names of the said sitting members may be erased from the return, and the two other candidates declared duly elected, and their names substituted in the said return." The petition, in the course of its statements, complained incidentally of misconduct and partiality in the returning officers of the borough, but in its prayer is silent altogether as to any claim for redress against them on the ground of misconduct. It is, therefore, in fact, a petition complaining of the undue election and return of members in Parliament, and of nothing else. That it was so treated by the House of Commons itself is evident from the form of the order of the House for taking the petition into consideration, such order distinctly mentioning the sitting members and petitioners only as the subjects of the petition; and again, the service of such notice and of the order of the House being made upon them alone. First, therefore, looking at the form of the petition in question, we think the returning officers were not called upon, as original parties to the petition, to appear before the House, and that, even if they are held to be included within the petition as parties petitioned against, yet, upon the proper construction of the act, (upon which the real question before us turns,) they had no power whatever to interfere in striking the committee. In order to arrive at a just conclusion upon this point, on which the whole strength of the first objection rests, let us consider, first, how the case stood as to returning officers before the present act; and next, what alteration with respect to them has been effected by the statute now under consideration. The original act, 10 Geo. 3, c. 16, commonly called the Grenville Act, the first which established the tribunal for the trial of controverted election returns, provides for the case of two parties only, the petitioners and the sitting members. This is obvious from a simple reference to the act itself. The statute 11 Geo. 3, c. 42, s. 6, provides for the case of two parties before the House where they petition on distinct interests, or complain on different grounds; but as to returning officers, both these acts are altogether silent. It is the 25 Geo. 3, c. 84, which, for the first

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time, mentions returning officers, and provides, in sections 10, 11, and 12, for two cases, viz., the case of no return made by the returning officer in proper time, and of a return made, not of members, but of special facts only; in both which cases, and in no other, the statute appears to put the returning officers in the place of the party petitioned against in the former acts, as to the notice to be served upon them, the order of the House for attending at the appointment of the committee, and the power of striking the committee; the 12th section expressly providing, that if there shall be more petitions than one presented, complaining of such return or omission of such return, upon distinct interests or upon different grounds, the House shall determine, from the nature of the case, whether the returning officer shall, together with the petitioners, be entitled to strike off from the list of members drawn by lot, or whether the list shall be reduced by the parties severally presenting the said petitions only. Under the acts, therefore, above referred to, if they had still remained in force, it would seem, that the returning officers would not have been entitled to strike off from the list of members drawn by lot upon a petition against them for partiality or misconduct; or, more properly, that the case of partiality or misconduct did not fall within the scope of the 25 G. 3. and would not have been necessarily tried before a select committee of the House appointed under that act, but that the House would have disposed of such a petition against the returning officers of their own authority and according to the customs, course of proceeding, and privileges of the House. The question therefore is whether the 9 G. 4, c. 22, has made any difference in this respect, and given any right to the returning officers, which they had not before, of striking the committee, in the case of a petition, charging them with partiality or misconduct? The second section, and the thirty-sixth, are the only clauses which seem to apply to the case of returning-officers.

The second section, so far as it relates to returning-officers, appears in its commencement to be confined to three cases of complaint; where no return is made in due time, or no return, according to the requisition of the writ, or there is complaint of the special matters contained in such return: it is altogether silent as to misconduct; but as the enacting part of that section directs, that "where no return has been made, or the special matter of the return, or the conduct of the returning officer is complained of," notice in writing of the time appointed for taking the petition into consideration shall be forthwith given by the speaker to the returning officer or officers, accompanied with an order to the parties to attend the House at the time appointed by themselves, their counsel, or agent; it may be too narrow a construction to hold the clause to be limited to the precise instances mentioned in the beginning of it, or to exclude from its operation any petition against the returning-officers for misconduct in the wider sense of that word. But whatever may be the scope and intention of the second section, and whether it includes within it a petition against the returning-officers for partiality or misconduct, or is confined to the cases before adverted to, it is the thirty-sixth section, and that alone, which carries out the intention of the statute, and shews the power given to the returning-officers in respect of striking the committee. Now, before we come to the consideration of that section, it is to be observed, that the statute has provided for all the cases of petitions, in which the sitting members are parties before the House, in three distinct sections—the 30th, the 33rd, and the 34th. The first of these sections provides for reducing the numbers of the committee,

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in the case where there are before the House the petitioners, the sitting members, or any party who has been admitted to defend the return or right of election. The second provides for the case where there are more than two parties before the House on distinct interests, or complaining or complained of upon distinct grounds; still, however, "parties whose right to be elected or returned may be affected by the determination of any such committee." And the last provides for the case where no parties appear before the House to oppose the petition. All which sections do, by their frame, manifestly apply to the cases where the sitting members, or those who appear to defend the return, are the parties, and have no application whatever to cases where the returning officers are parties before the House upon any ground of complaint against them. The cases of sitting members, and parties whose rights to the return and election are in question, having been thus provided for, the statute proceeds, in the 36th section, to make provision for the case of petitions against returning officers. This section is so worded as to make it in some degree doubtful whether it provides for the case where there is one petition only against the returning officers. It begins by referring to the case where there is one such petition only, and also to the case where there are more than one; but is silent altogether as to the course of proceeding where there is only one, whilst it gives clear and precise directions where there shall be more petitions than one presented on distinct interests, or complaining on different grounds. It is unnecessary to say, that if such clause does not comprise the case of a single petition against the returning officers, the case now under consideration is altogether unaffected by it. But assuming the case of a single petition against the returning officer to be necessarily within the intention of the clause, and that, by analogy with the other provisions of the act, the same mode of striking the committee shall take place as where there is one petition only in the case of sitting members, we think it clear the clause cannot apply to any case where the petition is not a petition against the returning officers alone, but is also, as in the present case, a petition against the sitting members who appear at the bar, and are made parties to defend their return before the House. First, because the case of the petition, where the sitting members are parties, is already clearly and expressly provided for; and there can be no reason to infer any intention that their rights in striking the committee, which have already been defined by the act, should be altered or affected by any complaint against the returning officers. Next, because the provision in this section is one which would exclude the sitting members altogether from assisting in striking the committee. The section provides expressly, "that the House shall determine whether the officer shall, together with such petitioners, be entitled to strike off the list in the manner hereinbefore directed, or whether such list shall be reduced by the parties severally presenting such petitions only." A provision which would exclude the sitting members altogether from assisting in striking the committee, and which therefore is necessarily incompatible with the case of a petition in which they are included as parties. Again, if this section could be held to relate to the case of a petition against the sitting members and the returning officers jointly, and it should be held that both had the power of striking, in what order, or in what proportion, are they to strike off the members? We cannot suppose that a clause, intended to comprehend such a case, would have been altogether silent upon the only point necessary to give it any operation. Now this is the only clause in the

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act which gives the returning officers a power to interfere in striking the committee, if the case is not brought within this clause, it cannot be held to come within the act. And, without relying upon the objections to which we have before adverted, that it is not a petition against the returning officers at all, for such ground of complaint as the statute had in view, or that it is not a case in which there are more petitions than one, on distinct interests or different grounds of complaint, we hold it to be the necessary construction of the clause that it does not comprehend the case where the sitting members are called upon to appear, do actually appear at the bar of the House, and are the parties opposing the petition. And it cannot but suggest itself, as an observation, that, in such a case, there is no necessity to hold the returning officers within the clause. For where the petition is against the sitting members, and complaint is incidentally made of the misconduct of the returning officers, there is no reason, upon general principles, why the committee struck by the petitioners and the sitting members, should not be supposed *a priori* an adequate tribunal to sit in judgment, with the strictest impartiality, upon the conduct of the returning officers, if the House think proper to depute their authority as to the returning officers to such committee. It appears, therefore, to us that in the present instance, the court was composed of the very same identical persons as those who would have constituted it, had the returning officers received notice from the speaker of the time of taking the petition into consideration, and had they attended at the bar of the House in pursuance of the order to that effect; for, in such case, they would have had no authority to alter a single name. The second and following objections will, we think, require less consideration.

It is objected, in the second place, that the recognizance entered into for the petitioners is not the recognizance required, or even sanctioned by the act; and that, as the language of the fifth section is in the negative, "that no proceedings shall be had upon any such petition, unless the person or persons subscribing the same, or some one or more of them," shall enter into the recognizance directed in and by that section, the entering into the proper recognizance forms a condition precedent to the validity of all the subsequent proceedings; and that the condition of the present recognizance not providing for all the events, nor agreeing with all the requisites contained in that section, the recognizance itself is altogether void, and the case stands precisely in the same position as if there had been no recognizance at all. But we are of opinion, upon the best consideration we can bring to the question, that the recognizance entered into upon the present occasion, although subject to some exception in point of form, is not open to any objection which affects it in substance or legal operation. The recognizance, it is to be observed, follows the form given in the schedule; and though such form, if it varies from the requisites of the act in any important or essential particular, cannot be taken to overrule the enactments of the statute itself; yet it is obvious that, if the schedule can be made consistent with the act, upon any sound and legal principles of construction, it is our duty so to construe the schedule. The fifth section expressly directs the recognizance to be entered into "according to the form hereunto annexed:" so far, therefore, as the intention of the legislature was concerned, there can be no doubt but that they intended that the form given in the schedule should embody in it the different requisites expressed in the act itself; and that they thought it sufficient for that purpose, otherwise the

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form would only operate as a false light to mislead, instead of affording assistance to those who are endeavouring to follow the directions of the act. The question therefore is, whether the discrepancies, which have been pointed out between the fifth section and the form in the schedule, are real and essential, or formal only; for, in the one case, the recognizance which has been given must be held to be void—in the other, good. Now, the objections which have been urged against the validity of the recognizance, are, in effect, two. First, that whereas the petition is subscribed by three persons, yet the recognizance is not only entered into by one only of the petitioners, but is altogether silent about the other two; so that (as it is argued,) it makes *Ransom* liable only for the costs of the witnesses summoned to give evidence in his behalf: whereas it is said witnesses might be summoned, and the trial carried on by the other petitioners, in case *Ransom* died, or refused, or became incapable to go on with the trial before the committee.

The objection is not merely that the recognizance is given by one only of the three petitioners; for to such objection it would be a sufficient answer, which was given at the bar, that, by the fifth section, it is expressly provided, that the recognizance shall be entered into "by the person or persons signing the petition—some one or more of them;" so that it was the manifest intention of the legislature that the responsibility of one only of the petitioners should be held sufficient: but the strength of the objection consists in that there is not any mention in the recognizance of the acts of the other petitioners. As an answer, however, to this objection, it is to be remembered, that the three petitioners were petitioners upon one and the same interests—that is, as electors of the borough; so that there was one petition only, not several upon distinct interests, or different grounds of complaint. When, therefore, the condition of the recognizance is so framed that *Ransom* shall pay "all costs, expenses, and fees, which shall be due and payable from him to any witness who shall be summoned to give evidence in his behalf," it necessarily means, summoned to give evidence on the behalf of that interest which he represents: that is, generally, in support of the petition. Again, the condition is not, as it has been argued, confined in its terms to witnesses summoned by him under the terms used in the condition: they may be summoned indiscriminately by any of the three petitioners; for witnesses so summoned would equally be "summoned to give evidence on his behalf." And, after all, comparing the words actually used in the recognizance, with the words employed in the fifth section, viz., that the recognizance shall be entered into by some one or more of the petitioners, "for the payment of all costs, &c., which shall become due to any witness summoned on behalf of the person or persons so subscribing such petition," we think the meaning of both substantially the same; namely, that each provides a security for the costs and expenses of all witnesses summoned, in the course of the investigation, in support of the petition.

The second objection urged against the recognizance is this, that it provides only for the payment of the costs and expenses of the party who shall appear before the House in opposition to the petition; whereas the fifth section directs security to be given for the payment of the costs and expenses to any party who shall appear before the House, or any committee of the House, in opposition to such petition. And it is argued, that new parties may, and often do, come in, and are allowed to appear before the committee, after the petition is pending before them, who were not originally before the House; and that, in this very case, the returning officers appeared before the Committee; the charges

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against them were entertained, and they were allowed to defend themselves, and did defend themselves against such charges. The question, therefore, that arises is, what is the meaning of the expression used in the fifth section: "A party who appears before the House, or any committee of the House?" It is manifest, by referring to the various parts of the statute, that the statute itself makes provision only for parties to be admitted parties by the House. It nowhere makes any provision for parties to be admitted by the committee to appear before them.

The tenth and the twelfth sections establish that point, in which provision is made for allowing parties, not originally petitioned against, to appear; in the one case, where the application is made within fourteen days after the petition has been presented; in the other, where a similar application is made within thirty days after the notice in the *Gazette*, therein referred to. But, in both those cases, the application is directed to be made to the House, not to the committee; and power is given to the House, not to the committee, to admit them. When, therefore, parties are said to appear before the committee, in opposition to appearing before the House, it is not in pursuance of any power given, or any provision made by this act, but under the power which committees have, by long and invariable usage, been known to possess; viz., that when sitting on the trial of elections, they have taken cognizance of incidental charges against the returning officers, and have allowed them a hearing and a defence, more as a matter of indulgence than a matter of strict right. For, unless the returning officers are made parties to the investigation by the House itself, under the powers given by the act, the House are not bound by the finding of the committee; but the right to call upon the returning officers, and to investigate any charge against them, and punish them for misconduct, when established by proof, still remains with the House itself. The first observation, therefore, is, that the recognizance, in its present shape, provides for all the costs, when the party appears before the only tribunal at which his appearance is directed by the statute itself; that is, before the House. But, it is said, the fifth section comprises within its meaning not only the costs and expenses of the parties appearing before the House, under the provisions of the act, but of parties afterwards appearing before the committee under the usage and practice of election committees.

Now it is manifest, that the objection which has been made in this case must apply to every election petition presented to the House, for it never can be known, at the time when the recognizance is entered into, whether there will or will not be parties appearing before the committee. It is not a question, therefore, (as represented in the course of the argument,) of varying the form, in order to make it suit the particular case; the form must be altered in every instance, by adding to the recognizance "the appearance of the parties before the committee." Whilst, therefore, the fifth section directs that the party shall enter into the recognizance according to the form annexed, we must, if we yield to the objection, adopt the conclusion that the party shall not in any case enter into the recognizance in that form, but that the recognizance must in every case be held void, unless it is first altered in the manner contemplated for. But we think so harsh and unreasonable a conclusion ought not to be resorted to where the section and the form given in the schedule can, by any fair intendment, be reconciled together. And we are of opinion that such is the case, and that, construing the fifth section and the form in the schedule

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together, the words used in the form, viz., "the party who shall appear before the House in opposition to the said petition," must be taken to comprise those parties who should appear generally in opposition to the petition, either at the bar of the house at an earlier period, or, in a more advanced stage of the proceeding, before the committee appointed to inquire and report its decision to the House; and that it is by no means improbable that the words relating to the appearance before the committee, have been introduced into section 5 for no other purpose than that of removing any doubt whether costs and expenses before the committee were intended to be included within the terms of the form of the recognizance. One argument used in support of the objection now under consideration was, that the form of the recognizance given by the schedule is subject to the same consequences as the form of a conviction or a declaration given for the recovery of a penalty, in which latter case, if the form is defective in stating a legal ground for the conviction or the demand, the whole proceedings fall to the ground. But in that case the conviction or declaration forms the basis or groundwork upon which the whole of the subsequent proceedings rest, which, if void, the whole must fall together; but here the proceedings in the suit before us are perfectly regular; the objection arises upon the form of a recognizance which is wholly collateral to the proceedings in the suit, and does not appear, nor does it form any part whatever of the proceedings in the action before us. And it is impossible here not to advert to the marked difference between this case and the case referred to, wherein Mr. *Halcomb* was the petitioner. There, the petitioner did all he could to withdraw himself from the trial. He did not, after the committee was struck by the officer of the House, appear before the House, or before the committee. Nothing, therefore, was done by him which could be construed into a waiver of the regularity of the proceedings, or an admission of the jurisdiction of the Court. Here, on the contrary, the sitting members, with full knowledge of the form in which the recognizance was given, instead of treating it as a nullity, and insisting that the course should be pursued which is marked out by the fifth section where no recognizance is given, raise no objection to its form, but attend the committee throughout, and contest the petition down to the final close of the trial. Without however resting, in any manner, upon the effect of such a waiver, we think the objections made to the recognizance are substantially answered by the construction of the statute itself.

The third objection is made against the report of the committee, which it is contended is altogether void, inasmuch as it decides nothing with respect to the charge, or the opposition to the charge, made against the returning officers being frivolous or vexatious. And upon this head it is insisted, that the 40th section marks out the line of duty of the committee, by requiring them to make such report; and that they having failed in reporting on any one point submitted to their judgment, the whole of the report is void, and with it all the subsequent proceedings are also avoided. That clause directs, that every such committee, at the same time that they inform the House of their final determination on the merits of the petition which they were sworn to try, shall also report to the House whether such petition did or did not appear to them to be frivolous or vexatious, (this is complied with in the present case); and in like manner, report with respect to every party who shall have appeared before them in opposition to such petition, whether the opposition of such party, did or did not appear to them to

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be frivolous or vexatious; this also has been complied with, so far as relates to the sitting members; but the contention is, that as no report is made as to the opposition of the returning officers, whether frivolous and vexatious or the reverse, therefore the whole of the report upon which alone the certificate for costs depends is void. Now admitting after the decision of the Court of King's Bench, in the case of *Truman v. Lambert* (4 M. & S. 234), that the returning officers in this case upon a petition shaped in its prayer, as is the present, might have been considered a party appearing before the committee in opposition to the petition, and therefore entitled to recover their costs as such party, if the committee had reported in their favour;—still we see no provision in this act which can be construed to make the report altogether void, as against the sitting members, because it is silent as to the petition against the returning officers, or the opposition made thereto. This question turns upon the 40th, and the 57th and 58th sections. The 40th section directs, that the committee at the time they inform the House as to their final determination on the matters of the petition, shall also report to the House whether the petition did or did not appear to them to be frivolous or vexatious, and in like manner report with respect to every party who shall have appeared before them in opposition to such petition, whether such opposition appeared to them to be frivolous or vexatious. The 57th and 58th sections shew the consequences which follow from such report, viz., that in one case the parties who appeared before the committee in opposition to the petition, shall be entitled to their costs; in the other case, the petitioners. Now the report in this case is, that the opposition to the petition by the sitting members appears to the committee to be frivolous and vexatious; and the consequence immediately follows, under the 58th section, that the petitioners are entitled to their costs to be taxed in the manner pointed out. There are no words in the 40th section which make the report of the committee, as to the opposition of all the parties who have appeared before them, a condition precedent to the validity of the report, as to those who are adjudicated upon in the report. The returning officers may have cause to complain that they have no remedy for their costs by a report made in their favour; but it can make no difference to the parties against whom the report is actually made, that it is silent as to others, against whom the committee might have reported. The measure of costs payable by any party reported against must be precisely the same, if properly estimated, whether the report extends to others or not. We see no ground, therefore, for holding that the want of the adjudication for or against the returning officers, supposing it to have become necessary under the circumstances before the committee, can, upon any clause in this statute, be held to avoid the whole report. The last ground of objection relates to the mode in which the taxation of costs is conducted. It is alleged that it included costs, not strictly and properly occasioned by the opposition of the sitting members against the petition, such as costs occasioned by the charge against the returning officers, and other charges not authorised by the statute. The costs to which the sitting members were liable, under the report of the committee, were undoubtedly confined by the act to those only which were strictly and properly occasioned by their own opposition, and by the taxation ought certainly to be confined to those alone. The course pursued appears to have been this:—The committee reported the opposition to be frivolous and vexatious, in consequence of which a request was made to the speaker to refer the bill of costs of the petitioners; the speaker thereupon directed the two

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examiners appointed by him to tax the costs and expenses mentioned in the requisition; and the examiners afterwards report that the costs and expenses allowed by them on taxation amount to a certain sum, and that the sitting members whose opposition to the petition appeared to the committee to be frivolous and vexatious, are liable to pay the same. Looking, therefore, only at the course of proceeding which took place, it appears to be strictly in conformity with the directions of the act; and there is nothing in the course of proceeding which can lead to the inference, that the examining officers in taxing the costs, or the speaker in granting this certificate, did any thing beyond their strict duty, by allowing any other costs than those occasioned by the opposition to the petition by the sitting members; and the only question is, whether in this stage of the proceedings this Court has any power to try the propriety of this allowance, or the principle upon which it was conducted after the certificate thereon has been granted by the speaker. And we are decidedly of opinion, that we have no such authority; but that the terms of the 60th section, "that the certificate signed by the speaker shall be conclusive evidence of the amount of such demands, in all cases and for all purposes whatsoever," are at once so clear and so precise, that we should be taking upon us a jurisdiction not granted or intended by the statute, if we interfered in any manner on the subject. It is obvious that any such interference would be altogether useless; for if, upon the discussion before us, it appeared to us that any mistake was made, we have no means of rectifying it by sending the matter back to the examiners, or to any other officer; and the consequence would therefore be, that if the smallest mistake in the amount was discovered as to a single item (as, indeed, was avowed in the course of the argument), the petitioners must lose the whole of their costs,—a conclusion at once so unjust and unreasonable, that if there was any doubt upon the words of the act, it would go strongly to shew that we could not have the power contended for. We therefore think the certificate must be treated as conclusive evidence before us, as to the amount for which the verdict is to be entered up. Upon consideration, therefore, of the several objections which have been argued before us, we think them answered by a reference to the act itself, and that the judgment must be entered for the plaintiffs as prayed.

Rule absolute.

SAME v. SAME.

Where the Court had ordered judgment to be entered up on the speaker's certificate, under 9 Geo. 4, c. 22, s. 63:—*Held*, that the defendants could not have the facts upon which the judgment was founded, entered on the roll by way of suggestion, for the purpose of bringing a writ of error.

AFTER the judgment of the Court had been delivered,

Sir J. Campbell, Attorney-General, moved that the grounds upon which the judgment was founded might be entered by way of suggestion on the roll, to enable the defendants to have the judgment reviewed on a writ of error. Whenever a judgment is given under the authority of a statute contrary to the course of the common law, the facts which authorize the judgment ought to appear by way of suggestion on the record. Thus where costs are awarded to a defendant, under 43 Geo. 3, c. 46, sec. 3, it is done by suggesting on the record that the plaintiff had not any reasonable or probable cause for arresting the defendant; but the statute gives no direction that the facts shall so appear by suggestion. A similar practice is followed, in suggesting that the

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cause of action arose in *Wales*, under the *Welsh* Judicature Act; that the action was brought against the defendant as a commissioner of taxes, and that he was therefore entitled to recover treble costs; and that the defendant resided in the county of *Middlesex*, and was liable to be summoned in the court of conscience for *Middlesex*. *Tidd's Pr. Forms*, 345, 9th ed. The stat. 9 Geo. 4, c. 22, sec. 63, gives no directions that the speaker's certificate should appear by suggestion; but the Court would not interfere unless it was produced. The judgment by *nil dicit* is in the present instance contrary to the fact; because the defendants do say something in bar or preclusion of the action (a). If the facts appeared by suggestion on the record, the defendants would be enabled to assign errors, and the court of error would decide whether the facts of the case authorized the judgment. In *Farr v. Denn* (b), the death of one of two defendants in ejectment was suggested; and in *Kemp v. Potter* (c), where the plaintiff in an action against a bankrupt made his election to proceed under the commission, it was held, that the defendant was entitled to have a suggestion recording the election on the record. [*Tindal*, C. J.—The plaintiffs

(a) The record was made up as follows:—*London*, (to wit,) *Robert Gill Ransom*, *Richard Crawley*, and *Henry Haken*, the plaintiffs in this suit, by *William Henry Ashurst*, their attorney, complain of *Robert Adam Dundas*, Esquire, and *Fitzroy Kelly*, Esquire, the defendants in this suit, who have been summoned to answer the plaintiffs in an action of debt. For that whereas the defendants on the second day of *November*, in the year of our Lord one thousand, eight hundred, and thirty-five, were indebted to the plaintiffs under and by virtue of a certain act of parliament made and passed in the ninth year of the reign of his late majesty, King *George* the Fourth, to consolidate and amend the laws relating to the trial of contested elections, or return of members to serve in parliament, in the sum of four thousand, six hundred, and ninety-four pounds, fifteen shillings, and seven pence, for costs and expenses incurred by the plaintiffs in prosecuting a certain petition of the plaintiffs, complaining of an undue election and return of the said defendants as burgesses to serve in parliament for the borough of *Ipswich*, and which said sum was to be paid by the defendants to the plaintiffs on request; whereby and by reason of the non-payment thereof, and by virtue of the said act, an action hath accrued to the plaintiffs, to demand and have of and from the defendants the said sum of four thousand, six hundred, and ninety-four pounds, fifteen shillings, and seven pence. Yet the defendants have not paid the said sum, or any part thereof, to the damage of the plaintiffs of ten pounds, and therefore they bring their suit, &c.

And the said defendants, by the said *William Henry Ashurst*, attorney for the said plaintiffs, who appears for the said defendants according to the form of the statute in such case made and provided, come and defend the wrong and injury upon, &c. but say nothing in bar or preclusion of the said action of the said plaintiffs, whereby

the said plaintiffs remain therein undefended against the said defendants. And afterwards, to wit, on the eleventh day of *June*, in the year of our Lord one thousand, eight hundred, and thirty-six, come here, the said *Robert Gill Ransom* and *Henry Haken*, by their attorney aforesaid, and the said *Richard Crawley*, comes not: and hereupon the said *Robert Gill Ransom* and *Henry Haken* give the justices here to understand and be informed, that after the commencement of this suit, and before this day, to wit, on the tenth day of *February*, in the year last aforesaid, the said *Richard Crawley* died, and the said *Robert Gill Ransom* and *Henry Haken* survived him, which the said defendants do not deny, but admit the same to be true. Therefore, let no further proceedings be had in this cause at the suit of the said *Richard Crawley*. And the said *Robert Gill Ransom* and *Henry Haken* also give the justices here to understand and be informed, that after the commencement of this suit, and before this day, to wit, on the twenty-fifth day of *January*, in the year last aforesaid, the said *Robert Adam Dundas* took upon himself the name of *Robert Adam Christopher*, by virtue of his majesty's licence and authority in that behalf, and hath ever since been and now is called and known by the said name of *Robert Adam Christopher*, which is also not denied. Therefore it is considered, that the said *Robert Gill Ransom* and *Henry Haken* do recover against the said *Robert Adam Christopher* and *Fitzroy Kelly*, their said debt, and also two hundred and ninety-five pounds for their damages, which they have sustained, as well on occasion of the detention of the said debt, as for their costs and charges by them about their suit in this behalf expended by the justices here adjudged to the said *Robert Gill Ransom* and *Henry Haken*, and with their assent. And the said *Robert Adam Christopher* and *Fitzroy Kelly* in mercy, &c.

(b) 1 Burr. 363.

(c) 6 Taunt. 549.

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would have no opportunity of answering the facts contained in the suggestion. They could not traverse the allegations.]

TINDAL, C. J.—I can say most unfeignedly for myself and my brethren, that we should be most happy if the facts of this case could be put upon the record; but we do not see how we have any power which enables us to do so. By the 63d section of the statute, it is enacted that the certificate of the speaker, as to the amount of the debt, shall have the force and effect of a warrant to confess judgment, and that the Court shall, upon notice and on the production of such certificate, enter up judgment in favour of the plaintiff, for the sum specified therein to be due, in like manner as if the defendant had signed a warrant to confess judgment to that amount. We must therefore consider the certificate as subject to the same circumstances as a warrant to confess judgment. We are empowered to inquire into the validity of the instrument, and the circumstances under which the application to enforce it is made; but when that is done, there is an end of the inquiry. In ordinary cases, the facts are never suggested with a view to ulterior proceedings. If it were so, there would then be an analogy to support the present application. But to make the suggestion now proposed would be idle, and worse than inoperative, and would only tend to injure the rights of the parties.

PARK, J.—This is a novel attempt; but I never yet heard of any precedent which would sanction the application.

GASELEE, J.—I was absent when this cause was argued, but I do not feel authorized to assent to this application.

VAUGHAN, J.—I should be very glad to give the defendants an opportunity to obtain a review of our decision, but it would be inoperative to enter the suggestion which is sought for.

Rule refused.

June 7.

GAUNT, demandant, v. WAINMAN, tenant.

Where lands were conveyed by deed which described them as being freehold, and a claim for dower was afterwards set up by the wife of the vendor. *Held*, that the purchaser was not estopped from shewing that the vendor was only possessed of a term of years in the lands.

WRIT of dower under *nihil habet*. The tenant pleaded that the demandant ought not to have her dower of the endowment of her husband, because he was not seised of such estate in the lands, whereof he could endow the demandant.

At the trial before Lord Denman, C. J., at the last York assizes, it was in evidence that the demandant was the widow of one William Gaunt. The lands in respect of which the dower was claimed were demised in 1607 for a term of 1000 years; and in 1796, one John Gaunt became entitled by assignment to the residue of the term. John Gaunt, by his will, devised the premises *in fee* to his son, the said William Gaunt; and in 1824, John Gaunt being dead, and William Gaunt, the husband of the demandant, having become bankrupt, his assignees sold and conveyed the premises to the tenant. The conveyance described the lands as being freehold.

It was contended for the tenant, that he was entitled to shew that *William Gaunt* was not seised of an estate of freehold in the premises. For the demandant, it was submitted, that the tenant was estopped from denying the title which was set forth on the face of the conveyance made to him by the assignees. A verdict was found for the demandant, subject to leave reserved for the tenant to move to set it aside.

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Wightman obtained a rule nisi accordingly.

Creswell and *Hoggins* shewed cause. In *Com. Dig. Tit. Estoppel* (A. 2.), it is said "a man may be estopped by matter of writing which is not of record; as if a condition in a bond recites that there are divers suits in B. R. The obligor is estopped to say, that there are no suits there," citing *Willoughby v. Brook* (a). The like rule is laid down in *Shephard's Touch*. 73. All the authorities are collected in *Lainson v. Tremere* (b). The tenant purchased the estate as freehold, and therefore he purchased it of the wife as well as of the husband. [*Tindal*, C. J.—Suppose the land was purchased as leasehold, would the demandant have been estopped from saying that it was freehold?] It may be conceded she would not.

Wightman, contrà.—The plea was proved at the trial, and it clearly appeared that the estate was not freehold. It would be a great hardship to prevent a party from saying that he has a less estate than he contracted to purchase. It would work as a double disadvantage. An estoppel must be mutual; it is admitted that in this case there is no mutuality, and that disposes of the question.

TINDAL, C. J.—This is a case in which the tenant is not estopped from shewing the true nature of the estate, as against the demandant.

The demandant is not estopped, and according to *Co. Lit.* 352 a. "every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason that regularly a stranger shall neither take advantage nor be bound by the estoppel." It would be a very great hardship if one party were bound and not the other. See how far it might be carried. If a party to the deed is bound, his heir would be also. Suppose an action be brought against the heir, in respect of lands from which he might have been evicted by title paramount. It would be very unjust to say he is estopped from shewing that the land was not the freehold of his ancestor. The rule must be made absolute.

PARK, J., *GASELEE*, J., and *VAUGHAN*, J., concurred.

Rule absolute.

(a) *Cro. Eliz.* 756.

(b) 1 *Ado. & Ellis*, 801, 3 *Nev. & Man.* 603.

June 8.

DOE *d.* JARMAN *v.* LARDER.

Where a mortgagor covenanted expressly to obtain a renewal of the lease of the premises mortgaged, and to assign it to the mortgagee: *Held*, that the mortgage deed did not require a 25*l.* stamp.

EJECTMENT to recover certain premises in the county of *Somerset*. At the trial, the lessor of the plaintiff put in evidence a mortgage-deed, which recited an indenture of lease for lives, from *Bruton Hospital*, and an assignment of it to the defendant; and it was witnessed that, in consideration of 130*l.*, lent by the lessor of the plaintiff, the defendant assigned the premises, mentioned in the lease, as a security for the repayment of the money so advanced, subject to the usual proviso for the redemption of the premises. The deed contained a covenant from the defendant to renew the lease from time to time, and to assign it to the mortgagee; and that in case he neglected to do so, then that the mortgagee might renew the lease, provided that the fines, fees, and costs, to be paid by the mortgagee upon such renewal, should not be a charge upon the premises to any larger extent than 70*l.* The deed was impressed with a 2*l.* stamp; but it was objected, on behalf of the defendant, that the stamp ought to be 25*l.*, because the cost, at which the mortgagor might procure a renewal of the lease, was uncertain (*a*). *Halse v. Peters* (*b*). The deed was received in evidence, and a verdict found for the lessor of the plaintiff.

Bere, in pursuance of leave reserved at the trial, obtained a rule nisi to enter a nonsuit, upon the ground that the stamp was insufficient.

Crowder shewed cause. The stamp of 2*l.* is sufficient to cover any sum not exceeding 200*l.*, and no greater sum than that is secured by this deed. It is immaterial that the mortgagor has covenanted to procure a renewal of the lease, for the cost which he may thereby incur forms no part of the money which is secured by the deed. *Halse v. Peters* (*b*) is distinguishable, because an uncertain sum, to be thereafter paid by the mortgagee, was secured. *Doe d. Scruton v. Snaith* (*c*); *Pruessing v. Ing* (*d*); *Deardon v. Binns* (*e*).

Bere contrd. The clause of limitation in the mortgage-deed only applies to sums which may be expended by the mortgagee; but the mortgagor is bound to pay any sum which may be demanded for the renewal of the lease. A limit ought to have been inserted of the amount to be expended by the mortgagor. If default were made in obtaining a renewal, the mortgagor would be liable to

(*a*) By 55 G. 3, c. 184, tit. *Mortgage*, the following duties are charged:—"Where the mortgage shall be made as a security for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable

Exceeding 100*l.* and not exceeding 200*l.*, 2*l.* And where the same respectively shall be made as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; other than and except any sum or sums

of money to be advanced for the insurance of any property comprised in such mortgage, or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed, whereby any annuity shall be granted or secured for such life or lives. If the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit, 25*l.*"

(*b*) 2 B. & Adol. 807.

(*c*) 8 Bing. 146. 1 M. & Scott, 230.

(*d*) 4 B. & Ald. 204.

(*e*) 1 Man. & Ry. 130.

be sued in covenant, and the mortgagee would recover damages. In *Halse v. Peters* (e), it was held that a mortgage for 1,500*l.*, with covenants for the payment of the yearly premium, and other costs and charges of an insurance of 1,000*l.* upon a particular life, required a 2*5l.* stamp; and the principle upon which that case was decided, is applicable to the present case.

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TINDAL, C, J.—This case does not present any difficulty to my mind. The question is, whether a 2*l.* stamp is sufficient on a mortgage for 130*l.*, with a power enabling the mortgagee to make a further advance of 70*l.* to obtain a renewal of the lease. It is clear that the stamp contemplated by the statute is payable upon a mortgage, or something in the nature of a pledge, and not upon a dry covenant under the seal of the party. Here, there being a covenant by the mortgagor to renew the lease, at all events, it is contended that the uncertain amount to be paid by him is a charge on the property, because the mortgagee may sue for damages if the covenant be not performed. But this liability does not come within the meaning of the clause which imposes a duty of 2*5l.* That applies to cases where the deed is “made as a security for the repayment of money to be thereafter lent, advanced, or paid;” that must be by the mortgagee; and the exception which follows, as to the payment of insurances by the mortgagee, shews that to be the meaning of the clause. This is a case where no money is to be advanced by the mortgagee beyond 200*l.*; and he has simply an action on the covenant, if the mortgagor failed to renew, just as he would have for a breach of a covenant for quiet enjoyment.

PARK, J.—I am of the same opinion. This is not a security for money, to be afterwards lent, advanced, or paid, within the meaning of the clause which has been referred to. The statute ought to be so construed, that it should not go one step further than the legislature intended.

GASHLEE, J., concurred.

VAUGHAN, J.—The stamp is sufficient: the deed was expressly framed to secure the payment of a definite sum. Our decision is in accordance with *Doe d. Scruton v. Snaith* (f).

Rule discharged.

(e) 2 B. & Adol. 807.

(f) 8 Bing. 146; 1 M. & Scott, 230.

NAPIER v. DANIEL and another.

June 9th.

THIS was an action to recover damages for the publication of a libel by the defendants, in which it was imputed to the plaintiff that he had tampered with some witnesses who were going before a grand jury to prefer a criminal charge: also, that he had made a brutal attack upon a gentleman's gamekeeper, and had afterwards run away as fast as his legs could carry him, and that 5*l.* was paid on his behalf to the gamekeeper, to stay proceedings in an action which had been brought for the assault. The defendants pleaded—first, Not Guilty; secondly, That the plaintiff did tamper with the witnesses; tairdly, That the plaintiff did assault the gamekeeper, and afterwards run away

A remark made by the jury during the summing up of the judge, will not affect a verdict which is afterwards formally delivered and recorded; although such remark was inconsistent with the verdict.

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in the manner alleged, and that 5*l.* was paid on his behalf to stay the action brought by the gamekeeper. *Replication, De injuriâ.*

The cause was tried before *Bolland, B.* at the last *Somerset assizes*. Evidence was offered to shew under what circumstances the plaintiff had assaulted the gamekeeper, but the evidence was contradictory. Whilst the learned judge was summing up, the jury shewed a disposition to find the third issue for the defendants, whereupon a discussion took place, and the plaintiff's counsel remarked that a verdict could not be found for the defendants on the third issue, unless all the allegations in the third plea were proved. The jury turned round, as if to deliberate, and the foreman said, "We are satisfied the plaintiff did not run away, but we think his witnesses confirm the defendants' statement as to the other circumstances of the assault." The judge then continued to read the evidence, and commented on that portion of it which was applicable to the third issue, and he said that to entitle the defendants to a verdict, the several allegations in the plea must be substantially proved.

The jury retired from the court, and after they had deliberated upwards of two hours, they found a verdict for the plaintiff on the first and second issues, and for the defendants on the third issue.

A rule *nisi* was obtained to enter a verdict for the plaintiff on the third issue, on the ground that a special verdict had been given, which, if entered according to its legal effect, amounted to a verdict for the plaintiff.

Bompas, Serjt., Crowder, and Rowe, shewed cause.—This is nothing like a special verdict. The jury were told by the judge that all the allegations in the third plea must be substantially proved; and they found a general verdict for the defendants after two hours' consideration. The remark which was previously made was a casual expression of opinion, which the jury were at liberty to alter before they finally found a verdict.

Fraser, Bingham, and Butt, contrâ.—It was necessary that all the allegations in the plea should be proved, to entitle the defendants to a verdict. The jury expressly stated, that they were of opinion that the plaintiff did not run away; and if the verdict had been recorded at the time, it must have been entered, according to its legal effect, for the plaintiff.

TINDAL, C. J.—This is an application to alter a verdict after it has been found and solemnly recorded, because of an observation made by the jury during the summing up of the evidence. It would afford a most dangerous precedent if we were to hold that this is not a good verdict. The jury merely expressed their opinion upon a matter of fact; but until a verdict is recorded, the jury may alter their decision. That is so laid down in *Co. Lit.* 227 b:—"After the verdict is recorded, the jury cannot vary from it; but before it is recorded, they may vary from the first offer of their verdict, and that verdict which is recorded shall stand."

The foreman of the jury observed,—We find that the running away did not take place; and then after some conversation between the counsel, the learned judge proceeded to explain to the jury the material points of the case. The jury afterwards retire, and remain together for a considerable time, and then find a general verdict for the defendants on the third issue. The proper course for

the plaintiff's counsel would have been to insist at the time the remark was made, that it amounted to a finding for the plaintiff on the whole of that issue, and then the jury would have known that they were in fact finding a verdict for the plaintiff.

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PARK, J.—It would have a dangerous tendency to yield to this application. Juries are frequently in the habit of giving such opinions before they deliver a verdict. When the jury retired, they had been instructed as to the facts which were necessary to be proved; and after consideration they found a general verdict.

GASELER, J.—I am of the same opinion. A verdict is something more than a mere interlocutory remark. The officer of the court was not called upon to record it as a verdict.

VAUGHAN, J.—We should invade the province of the jury, and do that which the Constitution does not permit us to do, if we made this rule absolute. It is not denied that the learned judge told the jury that there were three material facts which the defendants were bound to prove. The jury afterwards retire, and on their return deliver no special verdict, but find the whole issue in favour of the defendants.

Rule discharged.

ARNOLD v. ARNOLD.

June 11.

ASSUMPSIT for money lent. *Plea*—Non-assumpsit. Verdict for the plaintiff.

Newman applied for a rule *nisi* to arrest the judgment, on the ground that it appeared on the record that the writ of summons issued on the 20th of February, 1836; and the promise stated in the declaration, which was filed on the 8th of March, was laid, not under a *videlicet*, on the 27th of February, 1836. In 2 Will. Saund. 171, note (1), it is said, "Where an action was brought for taking away the plaintiff's wife, and keeping her from him until such a day, which was some time after the exhibiting of the bill, after verdict for the plaintiff, judgment was arrested, because the jury must be intended to have given damages for the whole time mentioned in the declaration. 1 Vent. 103, *Ward v. Rich*. So in trespass and false imprisonment, the plaintiff declared that the defendant imprisoned him the 1st of October, 9 W. 3, and detained him in prison for four months, and after verdict for the plaintiff and entire damages, judgment was arrested, because, the declaration being of Michaelmas Term, 9 W. 3, and the damages being entire and given for the imprisonment of four months from the 1st of October, it appeared that the damages were given for imprisonment after the action was commenced. 1 Ld. Raymond, 329, *Bransfield v. Lee*. See also Cro. Jac. 618. *Hanbury v. Ireland*, S. P." After citing other cases, the rule is laid down as follows:—"These cases seem to establish this principle, that where it is positively and expressly averred in the declaration, that the plaintiff has sustained damages

In *indebitatus assumpsit* for money lent, it appeared on the record after verdict, that the promise was alleged to be made at a time after the writ issued: *Held*, upon motion in arrest of judgment, that the date of the promise was immaterial, and that it must be presumed that a cause of action which accrued before the issuing of the writ was proved at the trial.

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from a cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested." Since the Uniformity of Process Act, 2 W. 4. c. 29, the issuing of the writ of summons is the commencement of the action. *Alston v. Undershill* (a). In *Com. Dig. Tit. Pleader* (C. 19), it is said, "The time of a matter charged in the declaration ought to be certainly alleged; and therefore in assumpsit, if the plaintiff omits the day when the promise was made, it is bad." *Dickinson v. Plaisted* (b) shews the validity of this objection. Here it appears on the record, that the cause of action accrued after the issuing of the writ, and that vitiates the whole of the proceedings. *Acton v. Eels* (c), *Champion v. Skipweth* (d), *Com. Dig. Tit. Pleader* (3 M. 5.) The statute of jeofails, 16 & 17 Car. 2, c. 8, is only applicable where the day has been once truly alleged. [*Tindal*, C. J.—*Matthews v. Spicer* (e) is a very strong case against you: if the new rules make no difference, there seems to be nothing in the objection.] That was a demurrer, but the objection might have been good in arrest of judgment. A rule nisi having been granted,

Bompas, Serjt. shewed cause.—*Steward v. Layton* (f) is expressly in point. There the record stated that the writ issued on the 24th of June, and that the slander for which the action was brought was spoken on the 27th of June, and upon motion to arrest the judgment, the Court said there was nothing in the objection. In the cases which have been cited, the day was material; but here the plaintiff must be taken to have proved a cause of action, which accrued before the writ was issued.

Newman, contrò, contended that after verdict the Court would suppose every thing to be right, unless as here, the contrary appeared on the record. *Bell v. Steward* (g). He cited *Rolle's Abr.* 792, pl. 12, in addition to the former cases; and distinguished *Steward v. Layton* (f), because the date must have been laid under a *videlicet*, which was not done in assumpsit, it not being directed in the form promulgated by the judges.

TINDAL, C. J.—No ground has been laid for arresting the judgment. The statute 16 & 17 Car. 2, applies to cases where the day is material. The broad ground of our decision here is, that in the common form of indebitatus assumpsit, the day is wholly immaterial. *Cole v. Hawkins* (i), and *Matthews v. Spicer* (e), were both decided on that ground. If it be once assumed that the day is immaterial, it can only then be supposed that a cause of action, which accrued before the date of the issuing of the writ, was proved at the trial. In the case of an action on a promissory note, that could not be done, because there the date is material.

PARK, J., GASELER, J., and VAUGHAN, J., concurred.

Rule discharged.

(a) 1 Cr. & M. 492. 3 Tyr. 427. 2 Dow. P. C. 26.

(b) 7 T. R. 474.

(c) Salk. 662.

(d) Siderfin, 307.

(e) *Strange*, 808.

(f) 3 Dow. P. C. 430.

(g) 1 Wilson, 255.

(i) *Strange*, 221.

STUART and others v. NICHOLSON and HOOLE.

THE declaration stated, that before and at the time of the making of the promise and committing of the breaches hereinafter mentioned, and thence hitherto, the plaintiffs carried on the trade and business of manufacturers of stove-grates and fenders, under and by the name, style, and firm of Messrs. *Stuart, Smith, & Co.*; and in the prosecution and exercise of their said trade and business, during all that time, laid out large sums of money in and about the inventing, designing, making and producing, and causing to be invented, designed, and made, and in and about the purchasing and procuring divers new and original patterns and models for the said stove and fender manufactories in their said business as aforesaid, (to wit, at *Sheffield*, in the county of *York*;) and the defendants, during all the time aforesaid, were also manufacturers of stoves and fenders, (to wit,) at *Sheffield* aforesaid. That before and at the time of the making of the promise hereinafter mentioned, the said patterns of the plaintiffs, invented, produced, and purchased by them, from time to time, had been frequently pirated, and the models thereof abstracted from the premises of the plaintiffs for clandestine and surreptitious imitation, use, and copy of the said patterns, whereby the plaintiffs were greatly injured, harrassed, and oppressed, and impoverished in the exercise of their said trade and business. That before and at the time of the making of the promise of the defendants hereinafter mentioned, (to wit,) on the 18th of *October*, 1831, one of the said patterns of the plaintiffs had been and was found on the premises of the defendants, and divers disputes and differences, and certain legal proceedings thereon arose touching the same between the plaintiffs and defendants. That thereupon, on the day and year aforesaid, in order then to settle the said disputes and differences, and put an end to the said legal proceedings, and to ascertain, define, and regulate the conditions, terms, and agreement on which the plaintiffs and defendants should thereafter carry on their said business respectively touching the patterns of the said plaintiffs in their said trade and business, it was then agreed to refer the whole matter to, and leave it in the hands of, mutual friends of the plaintiffs and defendants, for their direction, finding, award, and determination touching and concerning the same; and thereupon, on the day and year aforesaid, in consideration of the premises, and that the plaintiffs would consent to refer the said disputes to certain mutual friends, (to wit,) Messrs. *J. L., G. R., and R. S.*, and leave the whole matter aforesaid, and the said disputes, differences, and legal proceedings in their hands, for their award, direction, and determination, and would agree with and faithfully promise the defendants to abide by, perform, and keep their award, finding, direction, and determination in the same, the defendants then agreed to refer the whole matters aforesaid, and the said disputes, differences, and illegal proceedings, to the said *J. L., G. R., and R. S.*, and faithfully promised the plaintiffs to abide by, perform, and keep their award, finding, direction, and determination in the same. That the plaintiffs and defendants then referred the whole matters aforesaid, and the said disputes, differences, and legal proceedings, to the said *J. L., G. R., and R. S.*, for their award, direction, and determination, of which the defendants then had notice; and the

In an action for the breach of an agreement and undertaking, the declaration stated that the defendants consented to refer certain disputes to the award of arbitrators, and that they afterwards signed an agreement and undertaking which the arbitrators directed that they should sign. *Held*, that proof of the defendants' signature to the agreement and undertaking was sufficient evidence that they had submitted the matters in dispute to arbitration.

Semle, that an agreement to refrain from imitating new patterns for one year after they are in the market, is not illegal, as being in restraint of trade.

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said J. L., G. R., and R. S., afterwards, thereupon, on the said day and year aforesaid, entered into and upon the whole matters of the said disputes, differences, and legal proceedings, and afterwards, on the 19th of *October*, 1831, awarded, found, directed, and determined in the same that the defendants should pay a certain large sum of money, (to wit,) the sum of 200*l.*, (in the premises aforesaid so referred,) to the plaintiffs, and that they the defendants should make and sign, and perform and keep, the matters on the defendants' part and behalf to be performed and kept, of and in a certain memorandum in writing, to the effect and form following, (that is to say,) "that they the defendants thereby acknowledged having received the patterns of the plaintiffs surreptitiously and clandestinely, and that one was found on the defendants' premises on the 12th day of *October*, 1831, for which the defendants were sorry, and then bound themselves from that day, (to wit,) from the 19th day of *October*, 1831, not to use, directly or indirectly, any patterns of the plaintiffs, on any account whatsoever, until the patterns should have been out a clear twelve months from the time the said plaintiffs should have had any one pattern in the market; and that thereby it should be mutually agreed that the said document, then so signed by the defendants as aforesaid, should not be printed in any newspaper or otherwise, and that only two written copies should ever be in circulation." The plaintiffs then said that they, relying on the said promise and undertaking of the defendants in that behalf, had always abided by, performed, and kept the award, finding, direction, and determination of the said J. L., G. R., and R. S., in the said matter, and in the said disputes, differences, and legal proceedings, and afterwards, on the said 19th of *October*, 1831, received of the defendants the said sum of money, (to wit,) 200*l.*, pursuant to and upon the said finding, award, determination, and direction of the said J. L., G. R., and R. S., and had not printed the said document, or caused the same to be printed, in any newspaper, or otherwise, and did not circulate, or cause to be circulated, more than two written copies of the said document. And the plaintiffs further said, that although the defendants, on the said 19th of *October*, 1831, paid the sum of money, (to wit,) 200*l.* to the plaintiffs, pursuant to and under and upon the said award, finding, determination, and direction of the said J. L., G. R., and R. S., and also then made and signed the said memorandum in writing, to the effect and form before mentioned, and delivered the same to the plaintiffs; and although the said disputes, differences, and legal proceedings, upon, and by virtue of the said award, finding, direction, and determination of the said J. L., G. R., and R. S., then wholly ceased, determined, and were put an end to, nevertheless the defendants from the making and signing of the said memorandum, wholly refused and neglected to perform or keep the said memorandum in writing, and the matters thereof, on the defendants' part and behalf to be performed and kept, or any part thereof; but, on the contrary thereof, broke their said promise to the plaintiffs. The plaintiffs then averred, that after the making and signing of the said memorandum, (to wit,) on the 20th *October*, 1831, and on divers other days and times, from that day to the commencement of this suit, they expended large sums of money and labour in and about the inventing, designing, and producing, and causing to be invented, designed, and produced, and in and about purchasing and procuring divers new patterns and models, in the prosecution and exercise of the business and trade of the plaintiffs as aforesaid;

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and in so doing, the plaintiffs, after the making and signing of the said memorandum in writing, (to wit), on the 1st of *August*, 1835, at *Sheffield* aforesaid, invented and designed a certain pattern (to wit) of a certain fender, at considerable cost and labour to them the plaintiffs, from the use whereof and from the sale of fenders from the said pattern, large profits and gains would have arisen to them the plaintiffs within and during twelve months from the invention and design thereof, and from the time the said plaintiffs had the same in the market; but for the breach of promise and misconduct of the defendants hereinafter next mentioned; yet the defendants, well knowing the premises and not regarding their said promise to the plaintiffs, but contriving and intending to defraud the plaintiffs, in that behalf, afterwards and after the said plaintiffs had had the same in the said market, and long before the expiration of twelve months from the time of the said invention and design of the said fender, and the time when the said plaintiffs first had the same in the said market, (to wit) on the 1st of *August*, 1835, and on divers days between that time and twelve months next following the time when the plaintiffs first had the same in the market, did use directly and indirectly the said pattern of the said fender of the plaintiffs, and then made divers (to wit) 2000 fenders, from the use, direct and indirect of the said pattern, and in imitation and copy thereof; and then sold divers (to wit) 2000 fenders from the use, direct and indirect of the said pattern, and in imitation and copy thereof, and after and according to the said pattern of the said fender; by reason whereof the plaintiffs sustained great injury and damage in the market, and were unable to sell and dispose of fenders to the same extent as they would have done of the said pattern; and the plaintiffs further said, that the defendants did not incur the like or any expenses in and about the making and working fenders of the said pattern, and were thereby enabled to sell, and did in fact sell, within a year of the time when the pattern of the said fender of the plaintiffs first came into the market, divers (to wit) 10,000 fenders as aforesaid, so made by use, direct and indirect, of the said pattern of the plaintiffs, below the price at which the plaintiffs did sell the same; and divers persons, (to wit) one T. P., one E. G., one J. H., one J. B., one J. E., Messrs. B. and H., Messrs. B. and Sons, and others, who before that time had been and usually were customers of the plaintiffs, and would have bought divers (to wit) 2000 fenders of the said pattern, of and from the plaintiffs, but for the piracy and breach of promise of the defendants as aforesaid, for a long space of time, within a year of the time when the pattern of the said fender of the plaintiffs first came into the market, bought and purchased of the defendants divers, (to wit,) 2000 fenders so made by the defendants, in direct and indirect use of the said pattern of the said fender of the plaintiffs; and divers other persons, (to wit,) the said several persons aforesaid respectively, and divers others, refused to buy or take the said fenders of the said pattern, of or from the plaintiffs, of all which premises the defendants had notice; and by reason of the said several premises the plaintiffs lost divers great gains and profits, which they otherwise would have made, of and from the sale and use of the said pattern of the said fender, invented and belonging to the plaintiffs as aforesaid; and the plaintiffs said, that by reason of the premises, and of the defendants selling and offering the fenders of the said pattern in the market, at a much less price than the plaintiffs could afford to do, they, the plaintiffs, having incurred cost and labour in producing, inventing, and designing the same, which the

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defendants did not incur, divers persons, (to wit,) Messrs. M. and L. and divers others, refused to do further business with the plaintiffs, unless the plaintiffs would sell and let them have the fenders of the said pattern at the said reduced price at which the same were offered in the market by the defendants.

The second count stated the introductory circumstances, which led to the arbitration and award; and the signature and delivery by the defendants of the memorandum. It was then alleged, that in consideration of the said premises, and that the plaintiffs would abide by, perform, and keep the said award, on the part of the plaintiffs to be performed and kept, the defendants faithfully promised the plaintiffs not to use directly or indirectly, thereafter, any patterns of the plaintiffs, on any account whatever, until the patterns had been out twelve months from the time the plaintiffs should have had any one pattern in the market, according to the said memorandum of agreement, and the award and direction of the said arbitrators:—*Averment*, that the plaintiffs, confiding in the said last-mentioned promise, invented and produced a pattern of a fender in the market, of which the defendants had notice; with a breach as before.

*Pleas*—First, non-assumpsit; secondly, that the plaintiffs did not invent the fenders; and, thirdly, that the defendants did not use or sell fenders in imitation of the plaintiffs. Issue was joined on all the pleas.

At the trial, before Lord *Denman*, C. J., at the last *York* assizes, a verdict was found for the plaintiffs, with 200*l.* damages. Several fender-sellers were examined, to prove the facts stated in the declaration; but the only evidence which was offered to shew that the defendant *Hoole* had ever consented to the arbitration, consisted of the proof of his signature to the memorandum of agreement set forth in the declaration. It was contended for the defendants, that this evidence was insufficient, but the learned judge overruled the objection.

*Maule* moved for a rule *nisi*, in pursuance of leave reserved, to enter a non-suit upon the ground which was taken at the trial, and also for a new trial, and to arrest the judgment. The memorandum of agreement does not shew upon what consideration the promise was made, and non-assumpsit puts the promise in issue. This is an implied, and not an express promise, and therefore the plaintiffs were bound to prove the facts from which the implication arises.

Under the new rules (*a*), the plea of non-assumpsit puts in issue whether the promise was made upon the alleged consideration: so it is a denial of the fact of a warranty having been given “upon the alleged consideration.” *Passenger v. Brooks* (*b*) need not be disputed, because there the declaration stated the agreement; but the defendant offered new affirmative matter to shew that the plaintiff had defrauded the defendant, and it was properly held that such a defence ought to have been specially pleaded. And the award is bad, as being in restraint of trade; and if bad, there is no good consideration to support the promise, as every promise ought to appear on the record to be made on good consideration. A rule *nisi* having been granted,

*Cresswell* and *Hoggins* shewed cause. There was abundant evidence to go to the jury, to shew that both the defendants had consented to the arbitration:

(a) Hil. T. 4 W. 4. Tit. *Assumpsit*.

(b) 1 Scott, 560. 1 Hodges, 123. 1 Bing. N. C. 587.

the proof that they signed the agreement was of itself sufficient. No objection was made at the trial as to the proof of the consideration, and it is now too late; and it must be taken that the facts, which are stated in the declaration, are true. The defendants admit that they had surreptitiously obtained a pattern belonging to the plaintiffs, and that disputes and differences had arisen, and for the purpose of avoiding further discussion, the arbitration was agreed to. That is a sufficient consideration. Nor is the award bad, as being in restraint of trade. *Horner v. Ashford* (c).

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*Maule and Alexander, contrà.* The plaintiffs ought to have given evidence of the original submission to arbitration. The signature of the agreement by *Hoole* afforded no proof of the submission. No action could have been maintained upon the agreement alone, and therefore the introductory matters were introduced. Under the new rules, a distinction is taken between an implied and an express promise; but when the plaintiff relies upon an implied promise, he is bound to shew the facts from which it arises. In *Wallis v. Broadbent* (d), the declaration stated the terms of an old agreement, and a subsequent arrangement that the defendant should hold upon the terms of that agreement at a different rent; and, upon a plea of non-assumpsit, it was held that the first agreement must be proved, and *Pattison, J.*, said, "The plaintiffs are obliged to rely on the implied contract. Then non-assumpsit denies all the matters of fact from which the implied contract may be implied by law. If so, then it is necessary for the plaintiffs to prove the original term of the holding, and the transfer of the tenancy; and that the defendant continued to hold the premises, with the exception of the mere change in the amount of the rent, upon all the old terms of the original agreement." And the award is bad, as being in restraint of trade. *Horner v. Greaves* (e); *Hitchcock v. Cohen* (f).

Cur. adv. vult.

TYNDAL, C. J.—There have been two objections urged on the part of the defendants under this rule; one against the verdict which has been found for the plaintiffs, the other, in arrest of judgment. The principal objection which was urged at the trial against the plaintiffs' right to recover, and upon which the learned judge, who tried the cause, was strongly pressed to nonsuit the plaintiff, was, that there was no evidence of the submission of the two defendants to the reference, the award under which, forms the groundwork of the action. But we think the signature of the memorandum of agreement by both the defendants, which agreement was directed by the arbitrators, after the investigation of the case, to be given by the defendants, was a sufficient recognition of the authority of the arbitrators to supply the place of a more regular and formal submission. In the argument before the Court, another objection has been taken, and strongly urged upon our attention, viz., that there is no evidence whatever to connect the promise with the consideration alleged in the declaration; and that, under the plea of non-assumpsit, the plaintiff is bound to shew that the promise, which he alleges to have been made, was grounded on the previous consideration, or state of facts alleged by him, as its

(c) 3 Bing. 322; 11 Moore, 91.

(d) 2 Har. & Woll. 40.

(e) 7 Bing. 735; 5 M. & P. 768.

(f) Not yet reported in K. B.

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groundwork and support. Without giving any opinion whatever on that abstract question, we think the objection cannot, in any event, be allowed in this case: first, because the objection was not taken at the trial, which, if taken at that time, might have been removed by further evidence: and, secondly, because we are unable to see, upon the evidence, any state of facts other than, and different from, those alleged in the declaration, to which the promise can by possibility apply. The several facts stated in the declaration were proved, and the promise was proved in writing by the signature of the parties: we see no other circumstances, than those which preceded, which could form the consideration. As to the motion in arrest of judgment, we think the point raised, that the agreement was in restraint of trade, is far too doubtful, upon the allegations in this declaration, to justify us in arresting the judgment. The objection appears, upon the record, if the defendants shall be advised further to insist upon it, and we give our judgment for the plaintiffs.

June 4th.

### GRANGER v. TAUNTON.

Under the 61st section of 6 W. 4, c. 76, the sheriff of Oxford is not required to execute, in Oxford, writs which issue from the superior courts.

**HENDERSON** obtained a rule *nisi* to discharge a rule which had been served upon the sheriff of the city of Oxford, requiring him to return a writ of *ca. sa.* in an action which had been brought in this court. It appeared by affidavit that, previously to the Municipal Act, 6 W. 4, c. 76, the bailiff of Oxford had the execution of writs from the city courts, but that the sheriff of Oxfordshire executed all writs which issued from the superior courts. He contended that notwithstanding sec. 61 of the statute (a), the sheriff of the county was the proper officer to return this writ of *ca. sa.*

*Kelly* shewed cause.—It is the manifest object of the 61st section of the statute to render the practice uniform in all the cities and towns therein mentioned; and in many of those places, as *Southampton* and *Poole*, the sheriff had the execution of all writs which issued from the superior courts.

*Henderson, contra*, was stopped by the court.

**TINDAL, C. J.**—This case arises on the 61st section of the 6 W. 4, c. 76, which directs, that the sheriffs appointed by the town councils shall execute the office with the like duties and powers as the sheriff or the person filling the office of sheriff would have had if the act had not passed. The bailiffs of Oxford did not return the writs which issued from the superior courts, and we

(a) Section 61st enacts, "That in the city of Oxford, in the town of *Berwick-upon-Tweed*, and in the counties of the cities of *Bristol*, *Canterbury*, *Chester*, *Coventry*, *Exeter*, *Gloucester*, *Lichfield*, *Lincoln*, *Norwich*, *Worcester*, and *York*, and in the counties of the towns of *Carmarthen*, *Haverfordwest*, *Kingston-upon-Hull*, *Newcastle-upon-Tyne*, *Nottingham*, *Poole*, and *Southampton*, the council shall, on the first day of *November* in every year, appoint a fit person to execute the office of sheriff, with the like duties

and powers as the sheriff, or the person filling the office of sheriff, in the said town and counties respectively would have had if this act had not passed; and every person who, at the time of the passing of this act, shall hold the office or execute the duties of sheriff in the said town and counties respectively, shall continue to hold and execute the same until the first appointment of a sheriff therein under the provisions of this act, and no longer."

shall give full effect to the section by giving the sheriff of *Oxford* the same powers as they had. If the legislature had intended to take from the sheriff of the county the execution of writs from the superior courts, in *Oxford*, some more express enactment would have appeared.

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PARK, J., GASELNE, J., and VAUGHAN, J., concurred.

Rule absolute.

### ARMSTRONG v. FREE.

May 23.

**THIS** was an action to recover 15*l.*, being the amount of money expended by the plaintiff in repairing certain premises which had been occupied by the defendant as his tenant, under an agreement to keep them in repair. At the trial, before *Tindal*, C. J., the plaintiff proved the value of the repairs, and the defendant called no evidence in answer; but the jury nevertheless returned a verdict in favour of the defendant.

Where less than 20*l.* is sought to be recovered, the Court will not grant a new trial to the plaintiff, as upon a perverse verdict, although the verdict was clearly wrong.

*R. V. Richards* moved for a new trial, without payment of costs. He submitted that this was a perverse verdict, and that in such cases the Court would grant a new trial without requiring the plaintiff to pay the costs of the former trial.

*TINDAL*, C. J.—If I had been a jurymen, I should have decided in favour of the plaintiff, and the verdict has undoubtedly taken a wrong course; but we have a general rule, that when the damages are so small a new trial shall not be granted.

PARK, J., concurred.

VAUGHAN, J.—It is mercy to the parties not to interfere.

Rule refused (a).

(a) See *Jones v. Dale*, 9 Price, 591; *v. Underwood*, M'Le. & Younge, 266; and *Green v. Speakman*, 8 Moore, 339; *Manning Freeman v. Price*, 1 Y. & J. 402.

### PERQUERES v. BELL.

May 31.

**BALL** moved to make a rule absolute for judgment as in case of a nonsuit, the plaintiff having failed to try the cause in pursuance of a peremptory undertaking.

*Petersdorff* shewed cause, upon an affidavit, which stated that the cause was not tried in consequence of the absence of two material and necessary witnesses.

Upon default to try, after a peremptory undertaking has been given, it is no excuse to shew the absence of a material and necessary witness.

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TINDAL, C. J.—You ought to have applied to the Court to get rid of the undertaking when you found you could not find the witnesses. This is merely going over the same ground again, and making a peremptory undertaking to amount to nothing. The rule must be made absolute.

PARK, J., GASELEE, J., and VAUGHAN, J., concurred.

Rule absolute.

END OF TRINITY TERM.

# CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term, 1836.

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DOE dem. MARCH v. ROE.

Nov. 7.

**CHADWICK JONES** moved for judgment against the casual ejector. The affidavits shewed that the attornies' clerk went to the premises to serve the declaration in ejectment, when the daughter of the tenant in possession looked out of the first floor window, but refused to open the front door: the declaration was then read to her, and one copy of it was thrown down the area, and another copy was affixed to the front door of the house. A second attempt to serve the declaration was subsequently made, when a servant spoke to the applicant from the area, but she refused to open the front door, and said her master was not at home, and that she did not know whether he had received the copy which had been before left: another copy of the declaration was left with her, and whilst the clerk was explaining the purport of it to her, a man's voice was heard within the house. The tenant in possession subsequently wrote a letter to the attorney, in which he said that he was desirous of getting rid of the annoyance, and did not desire to put his landlord to expense, and proposed a meeting to arrange the terms upon which he should give up the premises, and upon such meeting he proposed certain terms which were not accepted.

Under special circumstances, a rule absolute for judgment against the casual ejector will be granted, although the tenant in possession has not been personally served.

**TINDAL, C. J.**—Take a rule absolute.

**GASELEE, J., BOSANQUET, J., and VAUGHAN, J.,** agreed.

(a) See *Doe d. Buttram v. Roe*, 1 Will. Wol. & Dav. 69.



*Com. Pleas.*

Nov. 2.

## SHERWOOD'S BAIL.

If the affidavit of the due taking of bail be sworn before the defendant's attorney, it is irregular.

**TOMLINSON** moved to justify bail by affidavit.

*Humfrey* objected, that it appeared, by referring to the bail-piece, that the affidavit of the due taking of the bail was sworn before the defendant's attorney. The Court allowed the objection, but granted time to amend the affidavit on payment of costs.

*Cor.*—TINDAL, C. J., GASELEE, J., BOSANQUET, J., and VAUGHAN, J.

Nov. 2.

## STEVENS v. UNDERWOOD.

An order was made at chambers, requiring the plaintiff or his agent (who attended the summons.) to give further particulars of demand; the order not being complied with, a rule nisi was obtained, calling on the plaintiff's attorney to give further particulars of demand. Upon shewing cause: *Held*, that service of the rule on the plaintiff was insufficient.

**ANDREWS**, Serjt., shewed cause against a rule, which called upon the plaintiff's attorney to shew cause why he should not deliver further and better particulars of the plaintiff's demand. He objected that there was a defect in the service of the rule, as the affidavits on the other side shewed that it had been served on the plaintiff, but not on his attorney.

*Mansel contra.*—It appears, by the affidavits, that the plaintiff's attorney had attended before a judge at chambers, when an order was made requiring the plaintiff, or his agent, to give further and better particulars. The present rule was obtained in consequence of that order not having been obeyed; and as the attorney was present when the judge's order was made, he must be taken to be cognizant of the circumstances.

TINDAL, C. J.—The defendant has mistaken his course. He obtains a rule against the plaintiff's attorney, but neglects to serve it upon him. It is said that the attorney must take notice of this application, because he was present at the judge's chambers when the order was made; but that is not sufficient, because it frequently happens that orders are made, and afterwards waived.

GASELEE, J., BOSANQUET, J., and VAUGHAN, J., agreed.

Rule discharged.

Nov. 9.

## VERE v. MOORE.

Where an action was brought in *Surrey*, on a bill of exchange, and the prothonotary taxed the plaintiff's costs as if the venue had been laid in *London*, where the attorney and witnesses resided; it was *held* that the taxation was incorrect, and that the plaintiff was entitled to the costs of trying the cause in *Surrey*.

**MOTION** to review the prothonotary's taxation of costs. The action was brought by the indorsee against the drawer of a bill of exchange, which became due on the 24th of *June*. The venue was laid in *Surrey*, and the defendant pleaded that he had not received due notice of the dishonour of the

bill. The Court allowed the motion, and ordered the costs to be taxed as if the venue had been laid in *London*.

bill by the acceptor. The cause came on for trial at the *Guildford* assizes, before *Gaselee, J.*, but no defence was offered, and a verdict was taken for the plaintiff for 300*l.* The learned judge granted speedy execution for 100*l.* The prothonotary, in taxing the costs, refused to allow the plaintiff greater costs than he would have been entitled to receive if the cause had been tried in *London*, where the plaintiff's witness and the attorney resided, and upwards of 20*l.* was disallowed on this ground.

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*Thesiger*, in support of the application.—The bill did not become due until it was too late to try the cause at the sittings in *London*; and it may be admitted that the plaintiff's object in laying the venue in *Surrey*, was to obtain a more speedy execution to recover his debt. The defendant by pleading a defence, which, not being proved, must be taken to be without foundation, compelled the plaintiff to try the cause.

*Wilde, Serjt.*, shewed cause in the first instance. If this motion is successful, a cause may be taken for trial to distant counties just as it may happen to suit the convenience or pleasure of the plaintiff's attorney. The witness and the attorney both resided in *London*, and the prothonotary exercised his discretion in refusing to allow more costs than the plaintiff could have received in *London*. It is the inveterate general practice, that the Court will not interfere with the prothonotary in a case like the present. The costs of counsel, briefs, and witnesses, are always in his discretion; and it is only where a general principle is incorrectly acted upon, that the Court will interfere (a). [*Tindal, C. J.*—Did not the prothonotary lay down a principle in this case?] It is a mere question of amount, and the discretion is a wholesome one, and is calculated to do justice to all parties. [*Bosanquet, J.*—The difficulty I feel is this: that a discussion will take place before the prothonotary, in all cases where the venue is transitory.] The plaintiff has no right to speculate on obtaining a speedy execution to recover his debt, but he ought to have laid the venue and tried the cause in *London* or *Middlesex*.

*TINDAL, C. J.*—I feel some difficulty in giving the prothonotary so much power; and as the case involves an important principle, we will ascertain what the practice is in the other Courts.

On a subsequent day, the Court said that the practice in the other courts was to allow full costs in cases similar to this, and the taxation was ordered to be reviewed.

Rule accordingly.

(a) *Mr. Prothonotary Watlington* stated according to the usual practice of the office. to the Court, that the costs had been taxed

## JOHNSON and another v. WINDLE and another.

Nov. 8.

A promissory note was given by the defendants to the plaintiffs, payable to their order, sixty days after date. The note was stolen by the plaintiff's clerk, and by means of forged indorsements, payment was obtained from the defendants, when the note arrived at maturity, the plaintiffs being at that time ignorant that it had been stolen. The defendants having refused to give up the note to the plaintiffs:—  
*Held*, that an action of trover was maintainable to recover it.

**T**ROVER to recover a promissory note, of which the following is a copy:—

" *Milford Wharf, London, 30th March, 1836.*

" Sixty days after date, we promise to pay *C. Johnson and Sons*, or order, thirty pounds value received in coals, ex ship *Two Brothers*; at Messrs. *Goslings and Sharpe*.

(Signed),

" *W. and C. Windle.*"

The declaration was in the usual form, and alleged that the plaintiffs were lawfully possessed of the note, as of their own property. The defendants pleaded, first, the general issue, not guilty; secondly, that the plaintiffs were not lawfully possessed, as of their own property, of the said promissory note, in manner and form as in the declaration alleged. Upon these pleas issues were joined; and by consent the following facts were stated in a special case for the opinion of the Court.

The plaintiffs are coal factors; the defendants are coal merchants. Both parties carry on business in *London*: the former under the firm of *Charles Johnson and Sons*; the latter under the firm of *William and Charles Windle*. The defendants are the makers of the promissory note before set forth. The plaintiffs are the payees therein mentioned. The note in question was made and drawn by the defendants on the day of its date, and delivered by them to the plaintiffs in the usual course of business, in part payment for part of a cargo of coals. The note was afterwards stolen from the plaintiffs; at the time it was so stolen, there was no indorsement upon it. On the day when it became due, Messrs. *Wilkins* were holders of the said note for value, and the same was presented by a clerk of Messrs. *Glyn*, bankers in *London*, on account of the said Messrs. *Wilkins*, to Messrs. *Gosling and Sharpe* for payment. They, as the defendants' bankers, paid the note, and debited the defendants' account with the sum paid; they afterwards handed over the note to the defendants, in whose possession it now remains. Upon the delivery of the note to the defendants by Messrs. *Gosling and Sharpe*, and whilst it remained in the defendants' possession, and before the commencement of this suit, the plaintiffs demanded the note of the defendants, but they refused to give it up. Afterwards, the present action was commenced. The promissory note was never indorsed by the plaintiffs, or by their authority; nor was any person ever authorized by them to receive the amount thereof. At the time when the note was handed over to the defendants, the following indorsements appeared upon the back of it:—

By *C. Johnson and Sons*, to Mr. *John Atkin*.

*John Atkin,*

*George Wright.*

All the indorsements on the note are forgeries, in the handwriting of one *George Wryghte*, who at the time the note was made and delivered to the plaintiffs, and for some time afterwards, was a clerk in their employ. The note was stolen from the plaintiffs by *George Wryghte*, whilst he was in their service.

The defendants had no notice that the indorsement of *C. Johnson* and Sons was a forgery, at the time Messrs. *Gosling* and *Sharpe* paid the same, nor for upwards of six weeks afterwards, when notice was given to the defendants of that fact, and when the plaintiffs first discovered that the note had been stolen.

If the Court upon the circumstances above stated should be of opinion that the plaintiffs were entitled to the property and to the possession of the note, when the same was demanded as aforesaid, and that there is sufficient evidence of a conversion by the defendants, the pleas are to be withdrawn, and judgment is to be entered for the plaintiffs by confession. If the Court shall be of opinion that the plaintiffs were not so entitled, or that there is not sufficient evidence of a conversion, then judgment of *nolle prosequi* is to be entered.

*Channell* for the plaintiffs.—The plaintiffs had the property in the note vested in them, and it has never been divested. The note would not pass by delivery, because it was payable to order, and therefore the cases where notes have been negotiable by a mere delivery, do not apply. The payment by the bankers was not a payment to the plaintiffs, because they had never indorsed the bill; and the rule is well established that no property passes by a forged indorsement. *Smith v. Sheppard* (a), *Mead v. Young* (b), *Thorp v. Harley* (c), *Forster v. Clements* (d). Nothing but payment to the plaintiffs, or to their order, would divest the property in the bill out of them, or it does not appear that they had been guilty of any negligence. If that circumstance were relied upon, the negligence ought to have been expressly stated. The defendants are in the same situation as if they had innocently received the goods of a bankrupt, after an act of bankruptcy.

*J. Bayley, contra*.—It is admitted that the defendants paid the note when it came due, to a holder for value. The questions are, first, whether this was a valid payment as against the plaintiffs; and secondly, if it was not, whether it was altogether so invalid, as to enable the plaintiffs to throw the loss upon the defendants. The distinction between instruments which are securities for money, and instruments which form the ordinary currency of the country, is remarked upon in *Lang v. Smith* (e). Here the note was negotiable to the order of the plaintiffs; and the defendants had no means of judging of the authenticity of the indorsements. It also appears that the plaintiffs were guilty of gross negligence. If the note had been properly taken care of, the loss would have been discovered within a less period than six weeks; and if the theft had been promptly ascertained, measures might have been taken to prevent any damage to the defendants. In *Morrison v. Buchanan* (f), where the clerk of a party who left a bill of exchange, enabled a stranger to discover the mark or number upon it; in consequence of which, the bill was delivered out to one who had no right to receive it, it was held that the party who so delivered it was not liable to an action of trover.

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(a) Sel cas. 243. Chitty on Bills, 287. 8th edition.

(b) 4 T. R. 30.

(c) Cited in *Allen v. Dundas*, 3 T. R. 127.

(d) 2 Campb. 17.

(e) 7 Bingh. 292.

(f) 6 Car. & P. 18.

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TINDAL, C. J.—It would be attended with most dangerous consequences if we were to give legality to a forged indorsement on a bill of exchange. The general rule is, that a forged indorsement gives no title; but the argument advanced for the defendants is, that such gross negligence appears on the part of the plaintiffs, as to take this case out of the operation of the general rule. But the statements in the case leave us in doubt as to the degree of negligence; and, for any thing which appears to the contrary, the plaintiffs might have taken ordinary care of the bill of exchange. If such a defence was intended there ought to have been a more precise statement to shew the negligence, but on the facts before us our judgment must be for the plaintiffs.

GASELEE, J.—In the case relied upon, negligence was expressly proved, but here no allegation of negligence appears.

VAUGHAN, J.—The plaintiffs have made out all the allegations which are essential in an action of trover. No fact is stated from which negligence can be inferred, and this case is therefore distinguishable from that which has been cited.

BOSANQUET, J.—I am of the same opinion. The note appeared upon the face of it to be the property of the plaintiffs, and the indorsements were altogether a nullity. The note having been demanded and refused, there is sufficient evidence of a conversion, and the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

Nov. 4.

PROLE and another, Administrators of W. S. ANDREWS,  
deceased, v. WIGGINS.

In an action on a bond by the administrators of the obligee, it was pleaded that the bond was given in pursuance of a corrupt agreement, that the obligee should take the son of the obligor, as his apprentice to learn the profession of surgeon, apothecary, and man-midwife, for two years only, but that in certain ar-

DEBT, on a bond, conditioned to pay *W. S. Andrews* 200*l.*, with interest. *Plea*—that the said *W. S. Andrews*, before and at the time of making the said writing obligatory, used, exercised, and carried on the art, mystery, and profession of a surgeon, apothecary, and man-midwife; and the said *W. S. Andrews*, so using, exercising, and carrying on the said art, mystery, and profession of a surgeon, apothecary, and man-midwife, as aforesaid, heretofore and before the making of the said supposed writing obligatory, to wit, on the 10th of *July*, 1828, at *London*, aforesaid, it was unlawfully and corruptly agreed by and between the said *W. S. Andrews* and the defendant, that the said *W. S. Andrews* would take *G. H. Wiggins*, son of the defendant, as his apprentice, to learn the art, mystery, or profession of a surgeon, apothecary, and man-midwife, for the term of two years; but that in and by certain articles of agreement of apprenticeship to be made and entered into by and

articles of agreement it should be made to appear that the apprentice was article for five years; in order that by such corrupt contrivance the parties might fraudulently and illegally procure the apprentice to be admitted for the purpose of practising as an apothecary upon serving two years instead of five years, as required by the statute. After verdict, it was moved to enter judgment for the plaintiff *non obstante veredicto*, upon the ground that no apprenticeship for five years was required for the business of a surgeon, and that the defendant could not object to the legality of his own bond; but the Court refused to grant a rule.

*Held* also, that the plaintiffs were not entitled to be relieved from payment of costs under 3 & 4 W. 4. c. 42, s. 31.

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between the said *W. S. Andrews* and the defendant, and his son, the said *G. H. Wiggins*, it should be stated and be made to appear therein, that it had been agreed by and between the said parties thereto that the said *G. H. Wiggins* had been and was articted to the said *W. S. Andrews*, for the term of five years, as his apprentice; and for that purpose that such articles of agreement should be antedated, in order that by such corrupt contrivance the said parties to the said agreement should fraudulently and illegally procure the said *G. H. Wiggins* to be admitted to examination for the purpose of practising as an apothecary, upon serving an apprenticeship for two years, instead of an apprenticeship for five years, as required by the statute in such case made and provided. And it was also agreed between the parties aforesaid, that the defendant should pay to the said *W. S. Andrews* the sum of 200*l.* at the end of two years from the time his said son should go to the said *W. S. Andrews*, together with interest for the same from the day the said *G. H. Wiggins* should actually go into the service of the said *W. S. Andrews*, and which said sum of 200*l.* and interest should be secured by the said bond or obligation in the declaration mentioned; and the defendant further says, that in pursuance of such corrupt contract and unlawful agreement so made as aforesaid, the said *G. H. Wiggins* afterwards, to wit, on the 15th of *July*, 1828, aforesaid, at *London*, aforesaid, entered into the service of the said *W. S. Andrews* as his apprentice, as aforesaid, and for the purpose aforesaid, and continued in such service for the space of two years from the day and year last aforesaid. And the said defendant further says, that in pursuance and in consideration of such unlawful and corrupt contract and agreement so made as aforesaid, to wit, on the 23d of *March*, 1829, the said bond or writing obligatory was executed and delivered by the defendant to the said *W. S. Andrews*, and certain articles of agreement were then, to wit, on the day and year last aforesaid, also made by and between the said defendant of the first part, the said *G. H. Wiggins* of the second part, and the said *W. S. Andrews* of the third part, and the same were antedated the 15th of *July*, 1825; which said articles of agreement, sealed with the respective seals of the defendant, the said *G. H. Wiggins*, and the said *W. S. Andrews*, were had, taken, and kept by the said *W. S. Andrews*, and therefore cannot be produced by the defendant. And in and by the said articles of agreement it is falsely and fraudulently recited, that whereas it has been agreed between the several parties thereto that the said *G. H. Wiggins* shall be articted to the said *W. S. Andrews* for the term of five years as an apprentice; and in and by the said articles of agreement it is also, amongst other things, falsely, unlawfully, and corruptly witnessed, that the said *W. S. Andrews* should and would, for and during the term of five years, teach and instruct, or cause to be taught and instructed, the said *G. H. Wiggins* in the art, mystery, or profession of a surgeon, apothecary, and man-midwife, and at the end of the said term do all such acts as might and should be needful for the facilitating the said *G. H. Wiggins* being duly admitted as a regular and qualified surgeon, and as in such cases were usual. And further, in and by the said articles of agreement it is made to appear, that the said *G. H. Wiggins* consented and agreed to become and be, and did thereby bind himself duly to serve the said *W. S. Andrews*, as his apprentice in the said art, mystery, or profession aforesaid, from the day of the date thereof for the said term of five years, whereas in truth and in fact the said articles of agreement were not made or executed by the said several parties thereto on the said 15th of *July*, 1825, but were

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really and actually made and executed by them respectively, with such object and in pursuance of such corrupt agreement as aforesaid, at a subsequent time, to wit, on the 23d March, 1829; wherefore the said supposed writing obligatory became and was wholly void in law.

*Verification and issue thereon.*

The cause was tried before *Tindal, C. J.*, at the last *London* sittings, when the facts stated in the plea having been proved, a verdict was found for the defendant.

*Storks, Serjt.*, moved to enter judgment for the plaintiffs *non obstante veredicto*. The question is, whether the facts stated in the plea are sufficient to shew that the bond was void. It is true that by the 55 Geo. 3, c. 194, s. 15, a five-years' apprenticeship is required to entitle a person to practise as an apothecary. But the defendant's son was apprenticed to learn the art of a surgeon as well as that of an apothecary. No apprenticeship for a particular period is required to practise as a surgeon, and it would not be a corrupt agreement to take the apprentice for two years to teach him surgery. The defendant's son might have been desirous of practising only as a surgeon, and then, in this view, the contract was not unlawful. At all events, although contracts may be void as to third persons, they may be enforced between immediate parties. Thus, in *Roberts v. Roberts (a)*, where one had executed the conveyance of an estate to his brother, for the purpose of giving him a colorable qualification to kill game, it was held, that the deed was valid as between the parties, and was sufficient to support an action of ejectment to recover the premises. *Armstrong v. Lewis (b)*, *Hawes v. Leader (c)*, *Montifore v. Montifore (d)*, *Smith v. Garland (e)*.

Nov. 8.

TINDAL, C. J.—We have looked at the pleadings to see whether they contained any allegation that the object of the parties was to evade the provisions of the statute 55 Geo. 3, c. 194. The bond was given to secure the payment of the premium to be paid in pursuance of the articles of agreement, and the plea states that the agreement was antedated, "in order that by such corrupt contrivance the said parties to the said agreement might fraudulently and illegally procure the said *G. H. Wiggins* to be admitted to examination for the purpose of practising as an apothecary, after serving an apprenticeship for two years, instead of an apprenticeship for five years, as required by the statute in such case made and provided." It is true that the object of the parties was also to apprentice as a surgeon, but there being a distinct allegation in the plea, that the intention was to defeat the provisions of the statute as to apothecaries, and the jury having found that the allegations in the plea are true, there is no ground for giving judgment *non obstante veredicto*. There can be no doubt but that the defendant may shew that the consideration was illegal. That is broadly laid down in *Collins v. Blantern (f)*.

Rule refused.

Nov. 12.

On a subsequent day, *Storks* moved for a rule to shew cause why the plaintiffs should not be exempted from the payment of costs, under 3 & 4 W. 4.

- (a) 2 Barn. & Ald. 367.  
 (b) 2 Cr. & M. 274.  
 (c) Cro. Jac. 270.

- (d) 1 W. Black. 363.  
 (e) 2 Meriv. 123.  
 (f) 2 Wils. 341.

c. 42, s. 31, upon the ground that they, as administrators, having found the bond in the possession of the intestate, were bound to sue the defendant.

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TINDAL, C. J.—I do not know what we might have thought if the plaintiffs had sworn that they were ignorant of the fraud; but here they knew by the plea that fraud was imputed, and they might have discontinued the action.

Rule refused.

### DAY v. BONNIN.

Nov. 2.

**HURLSTONE** moved to set aside an award, upon the ground that it was not final. The award recited that, by an order of reference made and signed by Sir N. C. Tindal, Knt., bearing date the 6th day of *August* instant, and made in an action then pending in the said court of Common Pleas, it was ordered that this cause, and all matters in dispute between the parties, should be referred to the award, order, arbitrament, final end, and determination of C. H.; and that it was further ordered that the said parties should in all things abide by, perform, fulfil, and keep such award, so to be made as aforesaid, and that the costs of the said cause, and of the reference and award, should abide the event of the said award, and that neither the plaintiff nor the defendant should bring any writ of error, or prefer any bill of equity against each other, of and concerning the matters so as aforesaid referred. "Now know ye that I, the said C. H., having heard, examined, and considered the allegations, proofs, and answers of both the said parties touching the matters in difference between them, and having thoroughly considered of the same, do thereupon make this my award in writing concerning the same, in manner following; (that is to say), I do award, adjudge, and determine that all further proceedings in the said cause shall from henceforth cease and be no further prosecuted, and that the said defendant, *J. Bonnin*, shall and do, on the 12th day of *September* now next ensuing, well and truly pay or cause to be paid unto the said plaintiff, *H. Day*, the sum of 11*l.* 5*s.* of lawful money, in full of all demands in the said cause."

It appeared, by affidavit, that the action was brought to recover the sum of 11*l.* 5*s.*, but that two distinct claims for different sums of money were made by the plaintiff before the arbitrator; one of which was admitted, and the other resisted by the defendant.

**Hurlstone**.—The award is not final and conclusive. A sum of money ought to have been awarded in satisfaction of the matters referred, and not in full of all demands in the cause. If the defendant were now sued in respect of the other demand, he would be unable to plead this award in bar of the action. No declaration was delivered in the action which had been commenced, and therefore the nature of that claim could not be ascertained. In *Gyde v. Boucher* (a), which was an action on a bill of costs, a verdict was taken by consent, and the cause was referred, together with all matters in difference. Another bill of costs was also disputed before the arbitrator, who awarded that the verdict should be entered for a certain sum, and that the defendant should

A cause and all matters in difference being referred by an order of Nisi Prius, the arbitrator stated, in his award, that having heard the allegations of both the parties touching the matters in difference, he made his award "concerning the same," and directed that all further proceedings in the cause should cease, and that the defendant should pay a certain sum to the plaintiff in full of all demands in the cause.—*Held*, that it sufficiently appeared that there were no other matters in difference, although it was shown that two claims were made by the plaintiff before the arbitrator.

(a) 2 Har. & Wol. 127. 5 Dow. P. C. 127.



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pay the costs of the reference, without saying that that sum was for the first bill of costs, or making any mention of the second bill; and it was held that the award was bad for uncertainty.

TINDAL, C. J.—Upon looking at this award, it appears to me with a sufficient degree of certainty, that the arbitrator has taken all the matters which were referred to him into consideration; and although he does not expressly negative that there were other matters in difference, it is apparent that it was his intention to do so. After reciting the submission of the 6th *August*, by which the cause and all matters in difference were referred, the arbitrator states that having heard the allegations of both the parties touching the matters in difference, he makes his award “concerning the same,” and directs that all further proceedings in the cause shall cease, and that the defendant shall pay a certain sum of money to the plaintiff. This leads my mind to the conclusion that there were no other matters in difference between the parties. In *Gyde v. Boucher (b)*, there were other matters in difference, and the arbitrator had not considered them. It is said that the defendant is under a hardship as to pleading the award in bar of any future action; but that is not so, because the award is conclusive to shew that nothing is due up to the 6th *August*. Unless we were to hunt for difficulties, this award seems to me to be sufficient.

GASELEE, J.—If it had been shewn that there were other matters in difference on which the arbitrator had not decided, there might be ground for granting this rule; but, by the terms of the award, the arbitrator says that there were no other matters in difference between the parties.

VAUGHAN, J., concurred.

BOSANQUET, J.—I am of the same opinion. It appears to me that the language used by Lord *Tenterden* in *Pearce v. Pearce (c)*, is appropriate to this case. He says, “There was in this case a submission of an action at law, a suit in equity, and of all matters in difference between the parties or either of them. The arbitrator has adjudicated upon the action at law by ordering the defendants to pay the plaintiff a sum of money. He has adjudicated upon the suit in equity by ordering the bill to be dismissed, and each party to pay his own costs. If there were no other matters in difference between the parties besides those included in the action at law and the suit in equity, the arbitrator by his award has decided upon these matters.” The only question here arises upon the face of the award, and when the arbitrator made it of and concerning the cause and all matters in dispute, he sufficiently shews that there were no other matters before him.

Rule refused(d).

(b) 2 Har. & Wol. 127. 5 Dow. P.C. 127.  
 (c) 9 B. & Cress. 488.

(d) See *Samuel v. Cooper*, 1 Har. & Wol. 86.

## IN THE EXCHEQUER CHAMBER.

## ROUX v. SALVADOR.

Nov. 16.

THIS was an action of assumpsit on a policy of assurance, in which a special verdict was found. The Court of Common Pleas, after hearing the argument of counsel, gave judgment for the defendant in *Hilary* Term, 1835 (a).

The cause was afterwards brought into the Exchequer Chamber by a writ of error, and was argued in Easter Vacation, 1836, before Lord Abinger, C. B., Littledale, J., Parke, B., Bolland, B., Alderson, B., Pattison, J., and Williams, J.

*Maule* for the plaintiff, contended, first, that there had been such a stranding of the ship as to enable the plaintiff to recover an average loss, *Barnett v. Kensington* (b), *Hoffman v. Marshall* (c); and secondly, that there was a total loss of the article insured, and that no notice of abandonment was necessary. He relied upon *Cambridge v. Anderson* (d), *Doyle v. Dallas* (e), *Robertson v. Clarke* (f), *Mullett v. Shedden* (g).

Sir J. Campbell, attorney-general, for the defendant (h), relied upon the cases referred to in the judgment of the court below (i), and also cited *Glennie v. London Assurance Company* (k), *Hunt v. Royal Exchange Assurance Company* (l), *Thompson v. Royal Exchange Assurance Company* (m), *M'Andrews v. Vaughan* (n), *Anderson v. Wallis* (o), *Anderson v. Royal Exchange Assurance Company* (p).

The cases are fully considered in the judgment of the Court.

*Cur. adv. vult.*

LORD ABINGER, C. B.—This was a writ of error upon a judgment of the Court of Common Pleas, in an action on a policy of insurance upon goods by the *Rosalane*, at and from any ports or places in *South America* to a port in *France*, or the *United Kingdom*, with various liberties not material to be mentioned. By a written memorandum at the foot of the policy, the insurance was declared to be on hides, shipped at *Valparaiso*, free of average unless the ship should be stranded; and in case of average loss, the underwriters were to pay the expense of washing and drying in full. The declaration contains the usual averments, and states that the hides were shipped at *Valparaiso*; that the vessel set sail with them on board for *Bordeaux*, a port in *France*; and that in the course of the voyage the hides became lost by the perils of the sea, and never arrived at *Bordeaux*. The plea is the general issue. It appears by the record that the cause was tried, and a special verdict found, which, after stating the facts necessary to support those parts of the de-

By a policy of assurance, hides were insured from *Valparaiso* to *Bordeaux*, free of particular average, unless the ship were stranded. The hides were damaged on the voyage by perils of the sea, and when the vessel put into *Rio Janeiro* to refit, they were found to be in a state of putrefaction, and that it was impossible to carry them in a saleable state to the termination of the voyage; the hides were consequently sold for a small price at *Rio*, for the purpose of being tanned:—*Held*, that this was not the case of a constructive loss, but of an absolute total loss; also that no notice of abandonment was necessary.

(a) See the Report, 1 Hodges, 49, where the special verdict is set forth.

(b) 7 T. R. 210.

(c) 2 Bing. N. C. 383. 1 Hodges, 330.

(d) 2 B. & Cress, 691.

(e) 1 Mood & Rob. 48.

(f) 1 Bing. 446.

(g) 13 East, 304.

(h) The Court stopped the argument on the first point.

(i) 1 Hodges, 49.

(k) 2 M. & Sel. 371.

(l) 5 M. & Sel. 47.

(m) 16 East, 214.

(n) Park on Ins. 185.

(o) 2 M. & Sel. 240.

(p) 7 East, 38.

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claration upon which no question arises, sets forth the loss in substance as follows :—That the hides of the value of 1000*l.* having been shipped in the vessel, she set sail on her voyage, in the progress of which she encountered perils of the sea and sprung a leak, in consequence of which she was compelled to put into *Rio Janeiro*, being the nearest port ; that her cargo was taken out and landed, when it was found, as the fact was, that the hides were damaged by the perils of the sea ; that by reason of their being wetted by the water issuing through the leak, and of the consequent dampness of the hold, they were undergoing a process of fermentation which could not be checked ; and that in consequence of their progressive putrefaction, it was impossible to carry them, or any part of them, in a saleable state to the termination of the voyage ; and that if it had been attempted to take them to *Bordeaux*, they would, in consequence of the putrefaction, have lost the character of hides before their arrival. The special verdict further states that the hides were in consequence sold at *Rio Janeiro* by order of the *French Consul* there, for the sum of 270*l.* ; that they were purchased to be tanned, and were afterwards tanned ; that the ship being repaired, set sail for *Bordeaux*, and was stranded upon entering the *Garonne*, and that the earliest intelligence of the damage and sale were received at the same time in a letter from *Bordeaux*. The judgment is entered for the defendant ; to set aside which judgment, this writ of error is brought. The stranding of the vessel, upon entering the river *Garonne* in her passage to *Bordeaux*, is introduced into the special verdict with a view to meet the supposed case of a partial loss ; and it has been contended that the fact of stranding being a condition to let in the claim for a partial loss, it is not material whether the stranding takes place whilst the goods insured are on board or after they have been landed. We are not prepared to adopt that conclusion, but the view we take of this case renders it unnecessary to enter into any discussion of the argument, or to pronounce any opinion upon it. It appears, from the report of the judgment of the Court of Common Pleas upon this case, that the learned judges were of opinion, that there was a constructive total loss in case it had been followed by an abandonment to the underwriters, and that their judgment for the defendant was grounded upon the want of such abandonment. It has been urged before us in support of the judgment, 1st, that there was no total loss ; 2ndly, that if there were any circumstances which might have amounted to more than an average or partial loss, they were not such as, without an abandonment, could have been converted into a total loss. Upon the first point, it has been contended, that even if these goods had not been excepted from average loss by the memorandum, unless upon the condition of stranding, there would not in this case have been a total loss, and that *à fortiori*, being goods so expressly excepted from average loss by the memorandum, they could not become totally lost so long as any part of them remained in specie at the termination of the risk ; that the risk terminated when the goods were taken out at *Rio de Janeiro*, when they were so far from being destroyed by the perils of the sea, that they were actually sold as hides and were capable of being tanned. It appears to us that there is no ground whatever for this assumed distinction between goods that are subject to a partial loss unconditionally, and goods excepted by the memorandum from such a loss. The interest which the assured may have in certain cases to convert a partial loss into a total loss, may be a fair argument to a jury upon a doubtful question

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of fact, as to the nature of the loss or the motive for an abandonment; and in the same view that interest has been adverted to occasionally by judges where the conclusions to be drawn from facts upon a special case, or upon a motion for a new trial, were open to discussion; but there is neither authority nor principle for the distinction in point of law. Whether a loss be total or partial in its nature, must depend upon general principles. The memorandum does not vary the rules upon which a loss shall be partial or total; it does no more than preclude the indemnity for an ascertained partial loss, except on certain conditions. It has no application whatever to a total loss, or to the principle on which a total loss is to be ascertained. Dismissing this distinction then, the argument rests upon the position, that if at the termination of the risk, the goods remain in specie, however damaged, there is not a total loss. Now this position may be just, if by the termination of the risk is meant the arrival of the goods at their place of destination according to the terms of the policy. But there is a fallacy in applying those words to the termination of the adventure before that period by a peril of the sea. The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea, from arriving in safety at the port of their destination. If by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel; whether upon such an event the loss is total or partial, no doubt depends upon circumstances. But the existence of the goods, or any part of them in specie is neither a conclusive nor in many cases a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed or can have the control of them, if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of re-shipment in another vessel. In such a case the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel; if it be certain that before the termination of the original voyage the species itself would disappear and the goods assume a new form, losing all their original character; if though imperishable, they are in the hands of strangers, not under the control of the assured; if by any circumstance over which he has no control they can never or within no assignable period be brought to their original destination: in any of these cases the circumstance of their existing in specie at that forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle.

Accordingly, in the case of *Hunt and others v. the Royal Exchange Assurance* (a), which was cited by the attorney-general in support of his argument,

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the judgment of Lord *Ellenborough* contains a very important passage, which distinguishes it from the present case. He says, "If, indeed, the cargo had been of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing assured;" and further he says, "I cannot necessarily infer that the flour would be changed in quality and condition, by the delay from *November* to *April*, so as to incur any material damage operating as a destruction of the thing insured." In the case of *Anderson v. Wallis* (b), which was also relied upon, the goods consisted of copper, which was wholly uninjured, and of iron, which was partially damaged; the assured, by their own agent, had possession of them; the ship was capable of repair, and might have prosecuted the voyage, and did, in four weeks after the accident, sail upon another voyage; the only pretence for a total loss was the retardation of the voyage; upon which ground, combined with the other circumstances, the Court held the loss not to be total. But it is clear, from the judgment of the Court, that if, by reason of the perils of the sea, the goods could never have been sent to their destination, the loss would have been held to be total. In like manner it will be found, in the other cases cited upon this part of the argument, that there has always existed one or more other circumstances, in combination with that of the goods existing in specie, to induce the judgment that the loss was not total; as, in *Glennie v. the Royal Exchange* (c), the rice had arrived at its port of destination, and, though damaged, was delivered to the consignees, and in a saleable state as rice. In *Thompson v. the Royal Exchange* (d), the tobacco and sugar, though damaged by the perils of the sea, were in the hands of the owner at *Heligoland*, and, as stated by Lord *Ellenborough* in his judgment, might, for any thing that appeared, have been forwarded to their port of destination. In *Anderson v. the Royal Exchange Assurance Company* (e), the wheat was partly saved, was in the hands of the shipper at *Waterford*, was kiln-dried, and might have been forwarded, as the rest of the cargo was, after the same operation, to its port of destination; but the owner, after dealing with it for some time as his own, abandoned it too late, even if he ever had a right to abandon it at all. In the case before us, the jury have found that the hides were so far damaged by a peril of the sea that they never could have arrived in the form of hides. By the process of fermentation and putrefaction, which had commenced, a total destruction of them before their arrival at the port of destination, became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time, they were taken out of the vessel; they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold, and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a constructive loss, but of an absolute total loss, of the goods; they could never arrive, and at the same moment when the intelligence of the loss arrived all speculation was at an end. It has indeed been strenuously contended before us, that the sale of the hides, whilst they remained in specie, rendered abandonment necessary to make the loss total; that the money pro-

(b) 2 M. & Sel. 240.

(c) 2 M. & Sel. 371.

(d) 16 East, 214.

(e) 7 East, 38.

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duced at the sale became vested in the assured; that he had an undoubted right to keep it if he thought proper, and to treat the loss as partial; and that, wherever it is in his power to treat the loss as partial, an abandonment is necessary to make it a total loss. The assured certainly has always an option to claim or not, but his abstaining from his right does not alter the nature of it; and if it be true that the proceeds of the sale vested in him, they would equally have done so if, instead of being sold in specie, the hides had actually changed their form, and been sold as glue, or manure, or ashes. The argument, therefore, in effect, resolves itself into this question, whether, when a total loss has taken place before the termination of the risk insured, with a salvage of some portion of the subject insured, which has been converted into money, the insured is bound to abandon before he can recover for a total loss. If any doubt should exist upon this point, it is important that it should be well considered and determined. The history of our own law furnishes few, if any, illustrations of the subject of abandonment, before the time of Lord Mansfield. That great judge was obliged to resort to the aid of foreign codes, and to the opinions of foreign jurists for the rules and principles which he laid down in the leading cases of *Goss v. Withers* (f) and *Hamilton v. Mendez* (g). But even those principles are, comparatively speaking, of modern date. The most ancient codes of the law maritime, when it was considered as part of the law of nations, contain no chapter upon assurances; neither do the earliest municipal codes, nor the earliest treatises upon assurances make any mention of abandonment. When a policy of assurance was considered in the nature of a wager, without reference to any actual interest possessed by the assured, it was needless to treat of abandonment. The code of *Florence*, which bears date 1523, contains no allusion to that topic. The decisions of the rota of *Genoa*, at the time when that state was most eminent for its naval power and commercial enterprise, have been preserved by *Straccha*. Amongst them are found many cases of insurance upon sea risks; not one of them turns upon any question of abandonment, or contains any allusion to that subject. The same author has written a very elaborate treatise upon assurances, but is equally silent on the subject of abandonment. He has also preserved in that treatise the form of a policy bearing date at *Ancona*, October 20th, 1567, which he says was at that time in general use amongst the states of *Italy*. From the terms of that policy it is difficult to infer any right or duty of abandonment. It contains this clause:—“Et si delle mercantie assecurate intervenisse o fosse intervenuto alcun disastro li assecuratorij debbono dare et pagare quelli danari assecurati al detto assecurato fra mesi due dal di che in *Ancona* ne fosse vera nueva. Et si pretendes sero per ragione alcuna dire in contrario non possono esser uditi da corte giudice o magistrato alcuno si prima non averanno pagati effectualmente danari contanti.” So that not only two months after the credible news of any disaster was the underwriter bound to pay a total loss, but if he meant to contest the claim, he was within that time to purchase the right of litigation by first paying the sum insured. It was, however, to be restored to him in the event of his success. There is also a clause in the policy by which, if there was no account of the ship for twelve months, the underwriter was bound to pay at the end of that time, subject to restitution if the ship should afterwards arrive; a provision wholly inconsistent with any notion of abandonment.

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The same law probably prevailed at that period throughout the states of *Italy*. But when assurances came to be considered as contracts of indemnity, and not as mere wagers, it became necessary to make some rules for the conduct of the parties where the loss was partial, as well as to secure to the assured, when it was total, the full measure of his indemnity, and no more. The obligation of abandonment was the necessary consequence of confining the object of the contract to a strict indemnity. Accordingly we find, in the chapter of assurances in the civil statutes of *Genoa*, in 1610, the disaster upon which the underwriter is bound to pay, is limited and defined to be the incapacity of the ship to proceed within a month after she has been disabled, or the detention of her by force, and the compulsory dereliction of her voyage, whereby she is forced to land the goods insured.

In those cases, the assured may either abandon the goods and demand the full insurance, or make up the amount of the loss and demand it from the underwriters, who, if it amount to 50*l.* per cent., shall have their option, either to pay that sum and leave the goods to the assured, or to pay the whole and take the goods. By the same law, wager policies are prohibited and declared void. Here it is obvious that the object of the law was to limit the claim of the assured to a strict indemnity. The same principle will be found in the various codes of the other maritime states of *Europe* in which abandonment is mentioned, though it must be admitted that the rules they have respectively adopted are very different. In some, abandonment is merely permissive and limited to very few cases. In others, as in the codes of *Rotterdam* and *Amsterdam*, abandonment was imperative, even in the case of an absolute total loss. Such seems to have been the law of *France*, as established by the ordinances *Louis XIV.* in 1681. From the words of that code indeed, it might be thought that they were only intended to prohibit it in all but the specified cases, and not to enforce it as a preliminary condition for recovering an absolute total loss, "ne pourra le delaissement etre fait qu'en cas de prise naufrage bris echouement arrêt de prince ou perte entiere des effets assurés, et tous autre dommages ne seront reputes qu'avariés." *Emerigon*, in his *Treatise des Assurances*, c. 17, s. 1, remarks, that abandonment presents to the mind the idea of a thing existing in whole or in part, or at least the idea of a doubtful existence; for it appears absurd to renounce to the assurers a thing of which the absolute loss is already established. Nevertheless, he says, according to our maritime laws, one may abandon to the underwriters a thing entirely lost, and, however singular it may appear, the law requires the form of an abandonment, in the process of an action de delaissement, though it be stated that the goods have absolutely ceased to exist. This apparent inconsistency in the law of *France* is now removed by the Code Napoleon. Under the title "du Delaissement," in the Code de Commerce, there are seven cases enumerated in which abandonment is permitted; amongst which the perte entière des effets assurés, is not to be found. There is, indeed, a power given to abandon, in case the loss or damage of the goods insured amounts to three-fourths; but the necessity of making an abandonment in case of the entire loss, seems to be guarded against expressly by the article 372, which provides that the abandonment shall extend to nothing but those effects which are the object of the assurance and of the risk. But whatever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in *England* has been so extensive, and the questions

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arising upon every branch of it, have been so thoroughly considered and settled, that we need not now look beyond the authorities of the *English* law to illustrate the principle on which the doctrine of abandonment rests, and the consequences which result from it. It is, indeed, satisfactory to know, that however the laws of foreign states upon this subject may vary from each other or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law. The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound, by the very letter of his contract, to pay the sum insured. But there are intermediate cases; there may be a capture, which, though, *prima facie*, a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship un navigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures at his own cost for realizing or increasing that value. In all these cases, not only the thing assured, or part of it, is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If in the event the loss should become absolute, the underwriter is not the less liable upon his contract because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain, which was uncertain before. In the language of Lord *Ellenborough*, in the case of *Mellish v. Andrews* (k), it is an established and familiar rule of insurance, that when the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his



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claim for that which is in fact an average or total loss, as the case may be. Again, in *Mullett v. Shedden* (i), the same learned judge says, "If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought there was much in the argument, that in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was totally lost to the owner, and the necessity of any abandonment was altogether done away. In that case the sentence under which the sale was made had been reversed, and the proceeds directed to be paid to the owner. So that there was a substitution of money for a portion at least of the matter insured. Both these cases are direct authorities that no abandonment is necessary where there is a total loss of the subject-matter insured. To which may be added the cases of *Green v. the Royal Exchange Assurance Company* (k), *Idle v. the Royal Exchange Assurance Company* (l), *Robertson v. Clarke* (m), *Cambridge v. Anderton* (n); this last is in all points similar to the present, and is an express decision that when the subject matter insured has, by a peril of the sea, lost its form and species; where a ship, for example, has become a wreck, or a mere congeries of planks, and has been *bond fide* sold in that state for a sum of money, the assured may recover a total loss without any abandonment. In fact when such a sale takes place, and in the opinion of the jury is justified by necessity and a due regard to the interest of all parties, it is made for the benefit of the party who is to sustain the loss; and if there be an insurance, the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter upon the payment by him of the total loss. It may be proper to mention, however, that the assured may preclude himself from recovering a total loss, if by any view to his own interest he voluntarily does or permits to be done any act whereby the interests of the underwriter may be prejudiced in the recovery of that money. Suppose, for example, that the money received upon the sale should be greater than or equal to the sum insured; if the assured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature. This is the true principle of the case of *Mitchell v. Edie* (o), which was cited as an authority for the decision of the Court of Common Pleas. There the insurance was upon sugar, from *Jamaica to London*. The ship had been captured by a privateer, deprived of some of her crew and a portion of her stores, then released and carried, by the remainder of the crew, into *Charleston*, where she arrived on the 18th *February*, 1782. The report does not state when the intelligence of this event arrived in *London*, but it is probable that it must have reached the assured before the month of *June* following. One of the owners of the ship was resident at *Charleston*, he took possession of her, and instead of dispatching her on the original voyage, he sold the cargo of sugar in the month of *June*, and sent the ship on another voyage. He had been connected with the assured in former adventures. He retained the money in

(i) 13 East. 304.  
 (k) 6 Taunt. 68.  
 (l) 8 Taunt. 755.

(m) 1 Bing. 446.  
 (n) 2 B. & C. 697.  
 (o) 1 T. R. 608.

his hands and came to *England* in *June*, 1783. The assured pressed him for payment of the money, but took no step to recover it; he became insolvent the following year. No claim was made upon the underwriters till after this event, and then after the expiration of three years from the alleged loss of the goods, notice of abandonment was given, and the action brought, upon which the defendant paid into court a sum sufficient to cover a general average, and pleaded the general issue. The Court gave judgment against the plaintiff, stating that he had abandoned too late. And it cannot be disputed, that if he ever had any colour for claiming a total loss, it must have been upon an abandonment before he heard of the sale, as he afterwards gave credit to his agent for the money, and elected to treat it as his own, till the event of an insolvency which prevented the underwriter from recovering it. But in fact, there never was a total loss by a peril of the sea. The sugars were safe at *Charleston*, and the sale by the owner of the ship was not a loss by a peril insured against. The secret of the conduct of the assured may be discovered by a reference to the dates and the circumstances of the time. During the war with *America*, and especially towards the close of it, the intercourse between that country and the *West India Islands* was much interrupted, and the price of colonial produce was higher in *Charleston* than in *London*. It was therefore probably his interest to give up his claim upon the underwriters and adopt the sale. If, therefore, the sale of the goods could have been treated as a loss, the conduct of the assured had either deprived him of the right to claim it, or made him liable if he had the right, to account to the underwriters for the amount of the sale. If, indeed, the Court must be supposed to have treated the sale at *Charleston*, as a loss for which the underwriter was at any time responsible, the case may be an authority for establishing the principle, that even when a total loss has occurred by a sale of the goods, the assured may, by his own conduct, in electing to take the proceeds instead of making his claim upon the underwriter, if he thereby alters the position of the facts so as to affect the interest of the underwriter, forfeit his claim to recover a total loss. But the case is in no view an authority for the judgment of the Court of Common Pleas, which, for these reasons, we think ought to be reversed and a verdict entered for the plaintiff for 27*l.* 15*s.* 6*d.*, and 40*s.* costs.

Judgment for plaintiff.

### MALACHY v. SOPER and another.

Nov. 14.

THE declaration stated that the plaintiff before and at the time of the committing of the grievance by the defendants as hereinafter mentioned, was possessed of and interested in divers, to wit, 1600 shares or parts, the whole into divers, to wit, 5000 shares or parts to be divided, of and in a certain mine, called the *Wheal Brothers*, situate in the parish of *Calstock*, in the county of *Cornwall*, such shares being of great value, to wit, of the value of 100,000*l.*

The plaintiff averred in the declaration, that he was possessed of shares in a certain mine, which were worked to his great profit, and that the

defendant published a libel, in which it was alleged that certain legal proceedings had been taken in Chancery against the plaintiff, and that persons, duly authorized by the Court of Chancery, had arrived on the workings at the mine, by means whereof his shares became much depreciated in value, and the plaintiff had been prevented from disposing of his shares, and from deriving profits which would otherwise have accrued to him:—*Held*, first, that in such an action, the plaintiff must allege and prove special damage: secondly, that the declaration did not contain a sufficient allegation of special damage.

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That before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, the said mine had been worked and used, and was then being worked and used, for and on the behalf of the plaintiff and the holders of shares and interests in the said mine, to the great benefit, profit, and advantage of the plaintiff, and to the great increase of the value of his said shares. That also before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, one *Horatio Nelson Tollervey* had instituted his certain bill of complaint in writing against the said *Robert Malachy*, the plaintiff, and others, in the high Court of Chancery of our lord the king; and in and by the said bill of complaint, the said *H. N. Tollervey* claimed to be a holder of and interested in divers shares in the said mine, and disputed the plaintiff's right to the whole of the said shares, and claimed in himself the said *H. N. Tollervey*, a right in and to a part of the same; and the said *H. N. Tollervey* did in and by his said bill of complaint pray that the said *Robert Malachy*, the plaintiff, and other persons, might answer the premises therein mentioned, and make a full and true disclosure and discovery of all and singular the matters therein mentioned, and that *H. N. Tollervey* might be declared to be entitled to 188-500dth parts or shares of and in the said mine, or in such other part or share thereof as the said court should be of opinion that he was entitled to, and that a proper legal assignment and transfer thereof might be made to him by all necessary parties; that the said plaintiff be compelled to come to an account with the said *H. N. Tollervey*, for so much of the profits which had been made in the said mine, as the said *H. N. Tollervey* had been entitled to receive in respect of his shares, and so far as such profits had been divided among the shareholders, and to pay to the said *H. N. Tollervey*, what should be due to him on such account, and also to pay to the said *H. N. Tollervey*, from time to time, his share of the profits of the said mine which should be divided and paid in respect of such shares as therein mentioned; and that the said plaintiff and other persons might be restrained by the order and injunction of the said court from selling or disposing of or transferring the said *H. N. Tollervey's* share and interest in the said mine, or any other shares or interest in the said mine, to the prejudice of the said *H. N. Tollervey's* therein mentioned rights and interests therein; and that some proper person might be appointed by the said court, receiver of the said mine and premises, with all usual and proper directions for carrying on the same under the direction of the said court; to the end that the said *H. N. Tollervey's* shares of the profits thereof might be properly secured for his benefit; or else that some proper person might be appointed by the said court as receiver of 188-500dth parts of the profits of the said mine, with all usual and necessary directions, and that the said plaintiff and other persons might be restrained by the injunction of the said court from retaining to their own use, or appropriating in any other manner the said *H. N. Tollervey's* share of the said profits; and such proceedings were had in the said suit, that before and at the time of the committing of the grievance by the defendants as hereinafter mentioned, the said *Robert Malachy* and the other persons had demurred to the said bill of complaint, and they demanded the judgment of the said Court of Chancery, whether they should be compelled to make any further or other answer to the said bill or any of the matters therein contained, and they prayed that the same might be thenceforth dismissed. That also, before and at the time of the committing

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of the grievance by the defendants as hereinafter mentioned, one *Richard Deadman Hayward*, had exhibited his certain bill of complaint in writing against the plaintiff and one *Samuel Lyle* in the high Court of Chancery; [here the contents of the bill were stated. It set forth a claim to certain other shares in the mine, and prayed for an account, and that a receiver might be appointed, in similar terms to the bill filed by *H. N. Tollervey*. It also prayed for an injunction to prevent the plaintiff and *Lyle* from selling their shares in the mine;] and such proceedings were had in the said last-mentioned suit, that before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, the said *Samuel Lyle* had demurred to the said last-mentioned bill of complaint, and he had demanded the judgment of the said Court of Chancery, whether he should be compelled to make any further or other answer to the said last-mentioned bill, or any other matters therein contained, and prayed the same to be thence dismissed with his reasonable costs in that behalf sustained; yet, the defendants, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his said rights, and to cause it to be suspected and believed, that the said shares of the plaintiff were of little or no value, and that the plaintiff had no right to use or work the said mine as aforesaid; and to hinder and prevent the plaintiff from selling or disposing of his said shares, and from deriving or acquiring from the said mine, any more profits, emoluments, or advantages whatever; and also to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, to wit, on &c., wrongfully and unjustly did publish, and cause and procure to be published, a certain false, malicious, and unfounded libel, in a certain public newspaper, of and concerning the plaintiff and his said shares, and the said using and working of the said mine, and of and concerning the aforesaid suits, bills, and demurrers; that is to say, "*Wheal Brothers'* silver mine, (meaning the said mine,) *Tollervey v. Malachy*, (meaning the first-mentioned suit,) and *Hayward v. Malachy*, (meaning the said second-mentioned suit. In these cases, (meaning the said two suits,) which arose out of disputes relating to the celebrated silver mine, *Wheal Brothers*, in the parish of *Calstock*, (meaning the said mine,) and which have been brought into the Court of the Vice Chancellor, the learned judge, after hearing long arguments and a multitude of affidavits, has set aside the demurrers, (meaning the said demurrers,) and granted the prayer of the petition, (meaning the prayer of the petition in each of the said bills as aforesaid,) for an account and an injunction, and persons duly authorized have arrived on the workings," (meaning the workings of the said mine,) thereby then meaning that the said several demurrers had been set aside by the said court, and that the prayer of the said petition, on each of the said bills, for an account and injunction, had been granted by the said court, and that persons duly authorized by the said court, had arrived on the workings of the said mine, and were hindering and preventing the said mine from being used and worked, as it before the committing of the said grievance, had been, and as the same would have continued to have been, in so ample and beneficial a manner for the plaintiff and others, the holders of the shares in the said mine; whereas, in truth and in fact, at the time of the committing of the said grievance, the said demurrers had not nor had either of them been set aside by the said court, nor had the prayer of the said petition on each of the said bills for an account and

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injunction been granted by the said court; and whereas, in truth and in fact, at the time of the committing the said grievance, no person or persons duly authorized by the said court, had arrived on the workings of the said mine, nor was nor were any person or persons hindering or preventing the said mine from being used and worked, as it, before the committing of the said grievance, had been, and as the same would have continued to have been, in so ample and beneficial a manner for the plaintiff and others, the holders of the shares in the said mine; by means of which said several premises, the plaintiff hath been and is greatly injured in his said rights, and the said shares so possessed by him and in which he was and is interested as aforesaid, have been and are much depreciated and lessened in value, to wit, in value of 50*l.*, of and in respect of each of such shares; and divers persons had believed and still did believe, that the said plaintiff had little or no right to the said shares, and that the said mine could not lawfully be worked or used for the benefit of the plaintiff; and the plaintiff hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done; and the plaintiff hath been otherwise hindered and prevented from gaining, acquiring, or deriving divers profits, emoluments, benefits, and advantages, which otherwise would have arisen and accrued to him from the same; and also, by reason of the premises aforesaid, the plaintiff hath been and was otherwise much damnified and injured, to the damage of the plaintiff of £2,000, and therefore he brings his suit, &c. *Plea—Not guilty*, and issue thereon.

At the trial before *Littledale, J.*, at *Exeter*, the learned judge left it to the jury to say, whether the value of the plaintiff's shares in the mine had been deteriorated by the publication, and a verdict was found for the plaintiff: damages 5*l.*

*Talfourd*, Serjt. obtained a rule *nisi* to arrest the judgment, upon the ground that an action for slander of title, could only be maintained where special damage was alleged and proved. *Lowe v. Harwood* (a), *Rowe v. Roush* (b). It was also objected that the innuendo was too large, and contrary to the inducement.

*Bompas*, Serjt., *Erle*, *Crowder*, and *Butt*, shewed cause.—This is not an action for slander of title, but it is a libel on the plaintiff in his trade and business, and in the way of gaining his livelihood. Therefore it was unnecessary to allege or prove any special damage. The declaration avers that the mine was being worked and used to the great profit and advantage of the plaintiff; and the allegation of damage is, that the plaintiff had been hindered and prevented from working the mine in so beneficial a manner as he otherwise would have done; and had been otherwise hindered from acquiring profits which otherwise would have arisen. Secondly, this is not verbal slander of title, but a written libel upon the plaintiff's title. In *Lowe v. Harwood* (a), and all the cases where it has been held that special damage must be proved, the slander was spoken, and not written. The damage which accrues by the publication of a written libel, is much more serious than that

(a) Cro. Car. 140.

(b) 1 M. & Sel. 304.

which happens by the use of slanderous words. The slander passes away and is forgotten, but a written statement inflicts a permanent injury. And the declaration alleges damage in the only way in which it could be alleged; it is stated that the shares were lessened in value, and that the plaintiff had been prevented from selling them; and the natural effect of a published statement, that a receiver from the Court of Chancery had been sent to the mine, would be to cause a depreciation of the shares. In *Hartley v. Herring* (d), which was an action for slandering a dissenting minister, it was held sufficient to allege, that by reason of the scandal, persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had, without saying who those persons were, or by what authority they excluded him. *Bois v. Bois* (e), *Pennymen v. Rabanks*, (f). In the present case it would be difficult to aver special damage in any other way. In *Millman v. Pratt* (g), which was an action for slander of title, it does not appear that any special damage was alleged in the declaration.

*Telford, Serjt., Barstow, and Rowe, contrd.*—All the authorities shew, that in an action for slander of title, special damage must be averred and proved. In *Lowe v. Harwood* (h), which was an action for slandering title, judgment was reversed, because all the Court agreed, "That the declaration was not good, because the action is not maintainable without shewing special prejudice; but slandering of one's title, doth not import in itself loss, without shewing particularly the cause of loss, by reason of the speaking the words, as that he could not let or sell the lands; but being general words they were not sufficient." *Tasborough v. Day* (i), *Gerrard v. Dickinson* (k), *Rowe v. Roach* (l). And if the plaintiff were entitled to maintain this action in respect of the shares in the mine which belong to him, then every other shareholder would also be entitled to sue the defendants, and an incredible number of suits would be encouraged. Nor can it be said, that this is a libel on the plaintiff in his trade. *Savage v. Robery* (m), *Manning v. Avery* (n).

*Cur. adv. vult.*

TINDAL, C. J.—In this case, a verdict having been found for the plaintiff at the trial of the cause, with 5*l.* damages, a motion has been made to arrest the judgment, on the ground that the declaration does not state any legal cause of action. And we are of opinion that this objection is well founded, and that the judgment must be arrested. This is not an ordinary action for defamation of the person by the publication of slander, either oral or written, in which form of action no special damage need either be alleged or proved, the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of the publication of a paragraph in a newspaper, which contains no other charge than that the petition in a bill filed in the Court of Chancery, against the plaintiff and certain other persons, as share-owners in a certain mine, for an account, and an injunction had been granted by the Vice-Chancellor, and that persons,

(d) 8 T. R. 130.  
(e) 1 Lev. 134.  
(f) Cro. Eliz. 427.  
(g) 2 B. & Cress. 486.  
(h) Cro. Car. 140.

(i) Cro. Jac. 484.  
(k) Cro. Eliz. 197.  
(l) 1 M. & Sel. 304.  
(m) Salk. 694.  
(n) Keb. 153.

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duly authorized, had arrived in the workings. The publication, therefore, is one which slanders, not the person or character of the plaintiff, but his title as one of the share-holders, to the undisputed possession and enjoyment of his shares of the mine; and the objection taken is, that the plaintiff, in order to maintain this action, must shew a special damage to have happened from the publication, and that this declaration shews none. The first question, therefore, is, does the law require, in such an action, an allegation of special damage? And looking at the authorities, we think they all point the same way. The law is clearly laid down in *Sir William Jones*, 196 (o), "of slander of title, the plaintiff shall not maintain action, unless it was *re vered* a damage; *scil*, that he was hindered in sale of his land; so there the particular damage ought to be alleged." And in addition to the cases cited at the bar, viz., *Sir John Tasborough v. Day* (p), and *Manning v. Avery* (g), the case of *Carr v. Goulding* (r), furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz. "his right and title thereunto is nought, and I have a better title than he." The words were alleged to be spoken *falso et malitiosè*, and that he was likely to sell, and was injured by the words, and that by reason of speaking the words, he could not recover his tithes. After verdict for the plaintiff, there was a motion in arrest of judgment, and *Rolle*, C. J., said, there ought to be a scandal and a particular damage set forth, and there is not here; and upon its being moved again, and argued by the judges, *Rolle*, C. J., held that the action did not lie, although it was alleged that the words were spoken *falso et malitiosè*, for the "plaintiff ought to have a special cause; but that the verdict might supply: but the plaintiff ought also to have shewed a special damage, which he hath not done, and this the verdict cannot supply; the declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged that there was a communication had before the words spoken, touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;" and cited several cases to that effect. We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the digests and other writers on the text law; and such we feel bound to hold it to remain at the present day. The next question is, has there been such a special damage alleged in this case as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver, that by the speaking he could not sell or lease (s), and that it will not be sufficient to say only that he had an intent to sell, without alleging a communication for sale (t). Admitting, however, that these may be put as instances only, and there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in the action for slander of title there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, that the plaintiff is injured in his rights, and the shares so possessed by

(a) *Lowe v. Harwood*.  
 (p) *Cro. Jac.* 484.  
 (g) *Keb.* 153.

(r) *Style's Rep.* 169, 178.  
 (s) *Cro. Eliz.* 197. *Cro. Car.* 140.  
 (t) *R. 1 Roll.* 344.

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him, and in which he is interested, have been and are much depreciated and lessened in value, and divers persons have believed, and do believe, that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit, and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done. And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require, where the action is not founded on the words spoken or written, but upon the special damage sustained. It has been argued in support of the present action, that it is not so much an action for slander of title, as an action for a libel on the plaintiff in the course of his business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it sufficient to advert to the declaration to be convinced that the publication complained of was really and strictly a slander of the plaintiff's title to his shares, and nothing else.

The bill in Chancery, out of which the publication arose, is filed by *Tollervey*, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the working of the mines, was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the plaintiff in the course of his business, or occupation, or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine. It has been urged, secondly, that however necessary it may be, according to the ancient authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds, and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, which of itself, it is contended, affords presumption of injury to the plaintiff. No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title, cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words, or writing, or print, but that it rests on the nature of the action itself, namely, that it is an action for special damage actually sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other publication, appears to us to make no other difference than that it is more widely and permanently disseminated, and the damages in consequence more likely to be serious than where the slander of title is by words only, but that it makes no difference whatever in the legal ground of action. For these reasons, we are of opinion that the action is not maintainable, and that the judgment must be arrested; and, consequently, it becomes unnecessary to inquire whether the innuendo laid in the declaration is more large than it ought to have been. We therefore make the rule for arresting the judgment absolute.

Rule absolute.



Nov. 8.

## TAYLOR v. BLACKLOW.

Certain title-deeds were entrusted to an attorney by his client, for the purpose of raising a loan of money upon mortgage; the attorney disclosed a defect which he discovered in the title, to one of his clients, who might be benefited by the disclosure, and who thereupon employed the attorney to take proceedings to recover the estate:—*Held*, that the attorney was guilty of a gross breach of duty, and that he might be sued for the damages which the client who deposited the deeds had sustained, in consequence of his misconduct.

THE declaration stated, for that whereas, before and at the several times hereinafter mentioned, the defendant was an attorney, to wit, an attorney of the Court of Common Pleas at *Westminster*; and the plaintiff then claimed to be lawfully entitled to, and interested in, a certain estate, to wit, in certain messuages, buildings, lands, tenements, and premises, with the appurtenances, in the county of *Kent*; and before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, was desirous to borrow and obtain an advance of money, to wit, the sum of 4000*l.*, by way of mortgage and security upon the said estate and premises, whereof the defendant, before and at the time of the committing of the grievance by him committed, as hereinafter stated, had notice; and thereupon heretofore, to wit, on the 22nd day of *March*, in the year of our Lord 1833, the defendant, so being such attorney as aforesaid, represented to the plaintiff that he had a client who would advance the said sum of 4000*l.*, on sufficient security, and at a moderate rate of interest, to wit, at the rate of 4*l.* per cent. per annum for interest on the same; and the plaintiff, at the request of the defendant, retained and employed the defendant as such attorney to use due endeavours to obtain and procure the said sum of 4000*l.* on such mortgage for the plaintiff, for reasonable reward to the defendant in that behalf; and the plaintiff, at the request of the defendant, then delivered to the defendant, as such attorney, and in pursuance of the said retainer, divers, to wit, six, abstracts of, and relating to, the title of the plaintiff of, in, and to the said estate and premises, and certain other documents also relating to the same, to wit, a statement of the number of acres of which the said estate consisted, and the names of the tenants and occupiers of the same; and thereupon, and by means of the premises, the defendant afterwards, and before the committing of the grievance by the defendant as hereinafter mentioned, to wit, on the day and year aforesaid, as such attorney of and for the now plaintiff as aforesaid, discovered and ascertained that there was a certain defect in, and objection to, the legal right and title of the plaintiff to the said estate and premises, to wit, that in two of the title-deeds of and relating to the said estate and premises, a part of the said estate and premises, to wit, sixty acres thereof, and certain messuages, buildings, and improvements thereon, had not been sufficiently conveyed to or for the use or benefit of the plaintiff, and that by reason and on account thereof, a certain person, to wit, *John Henry Taylor*, the brother of the plaintiff, then had, in point of law, a legal title to such part of the said estate and premises, and to recover the possession of the same, although, in justice and equity, the beneficial interest in the whole of the said estate and premises then belonged to the now plaintiff; and by reason of the premises, and under and by virtue of the said retainer and employment, it then became and was the duty of the defendant not voluntarily or unnecessarily to divulge or communicate the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises to the said *J. H. Taylor*, or to any other person, and not to instigate, or cause or procure to be commenced or prosecuted, any action or

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proceeding for the recovery of the said estate and premises, or any part thereof, from the now plaintiff, for or by reason or on account of such discovery of the defendant by the means aforesaid; nevertheless, the defendant, so being such attorney as aforesaid, but not regarding his duty as such attorney, nor his duty in the premises under and by virtue of his said retainer and employment, but contriving, and craftily and subtilly intending to injure and annoy the plaintiff, and to cause and procure a great part of the said estate and premises, to wit, the said sixty acres thereof, and the said messuages, buildings, and improvements thereon, to be recovered from him, by unjust, vexatious, and improper proceedings, heretofore, to wit, on the day and year aforesaid, dishonorably, wrongfully, and unjustly, and for the sake of fees and unjust reward in that behalf, in violation of his duty as such attorney, and contrary to his said duty in the premises, and in violation of good faith, voluntarily and unnecessarily divulged and communicated the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises to the said *J. H. Taylor*, and then wrongfully, maliciously, dishonorably, and oppressively, contriving and intending as aforesaid, heretofore, to wit, on the day and year aforesaid, instigated and caused and procured divers, to wit, four actions of ejectment respectively, on the demise of the said *J. H. Taylor*, to be commenced against divers, to wit, twelve tenants of the now plaintiff of certain parts of the said estate and premises of the plaintiff; and the said now plaintiff having, as landlord, duly appeared and defended the said actions of ejectment, the now defendant prosecuted the same, and also wrongfully, maliciously, unjustly, and oppressively caused and procured a certain other action, by and in the name of the said *J. H. Taylor*, against the now plaintiff, to be commenced and prosecuted for a certain pretended cause of action, to wit, the cutting down and converting certain timber, before then growing on the said estate and premises of the plaintiff; and the now defendant, further contriving and intending as aforesaid, also then wrongfully and maliciously, unjustly and oppressively, instigated and caused and procured to be commenced, in the name of the said *J. H. Taylor*, against the now plaintiff, divers, to wit, four other actions, for the recovery of certain sums of money claimed to be due from the now plaintiff, which, but for such instigation and causing and procuring of the now defendant would not have been so commenced or prosecuted; and the defendant, further contriving as aforesaid, then falsely and maliciously instigated and persuaded, and caused and procured the said *J. H. Taylor* to commence and prosecute against the now plaintiff a certain untenable suit in the Court of Exchequer for setting aside the conveyance to the now plaintiff of his said estate of and in the said premises, and which was afterwards, to wit, on the 9th day of *July*, 1834, according to equity and justice, dismissed, with costs to be paid by the said *J. H. Taylor*; and the now plaintiff further saith, that in order to obtain relief in the premises, he was heretofore, to wit, in *Hilary* Term, in the fourth year of the reign of our lord the now king, forced and obliged to file, and did file and prosecute his certain bill of complaint against the said *J. H. Taylor* in the Court of Exchequer, for relief in the premises, and in order to obtain an injunction against the prosecution of the said actions of ejectment, and was also then forced and obliged to apply to the said Court of Exchequer for relief

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against the said now defendant; by means of which said breach of duty, and of the said false, deceptive, fraudulent, and malicious conduct of the defendant in the premises, the plaintiff hath been forced and obliged to incur, and hath incurred, great trouble of mind and body, and great expense of his monies, to wit, to the amount of 2000*l.*, in defending and resisting the said unjust and vexatious proceedings, and in obtaining and enforcing, and in endeavouring to obtain and enforce, by due and lawful ways and means, relief against the same and other unlawful, unjust, and oppressive proceedings of the now defendant in the premises; and by means and in consequence of the said *J. H. Taylor* having become insolvent and unable to pay the costs of the said vexatious proceedings, so instigated and caused and procured, by the now defendant to be instituted and prosecuted in his name as aforesaid, the now plaintiff hath been and is unable to recover or obtain payment or satisfaction of or from the said *J. H. Taylor* of the said costs, and he is wholly unable to pay or satisfy the same; and the now plaintiff hath been and is, by means of the said several malicious and unjust, vexatious and improper conduct of the defendant, greatly harassed, oppressed, vexed, and impoverished, and otherwise greatly injured; and also, by means of the premises, the plaintiff was hindered and prevented from raising and procuring the said money, or other money, on mortgage of the said estate and premises, for a long time, to wit, from thence until the 20th day of *January*, in the year of our Lord 1836, and was then, by reason of the premises, forced and obliged to raise and procure, on mortgage and security of the said estate and premises, a much larger sum of money than the said sum of 4000*l.*, to wit, the sum of 6000*l.*, and at a greater rate of interest than at and after such rate of 4*l.* per cent. per annum, to wit, at and after the rate of 4*l.* 10*s.* per cent. per annum, for each and every 100*l.* thereof; to the damage of the plaintiff of 2000*l.*; and thereupon he brings his suit, &c.

*Plea.*—And for a further plea in this behalf the defendant saith, that before and at the time when he represented to the plaintiff that he the defendant had a client who would advance the said sum of 4000*l.* on sufficient security and at interest, and before and at the time when the plaintiff delivered to him the defendant the said abstracts and other documents relating to the said estate and premises, and before and at the time when the said defendant discovered and ascertained that there was a certain defect in and objection to the legal right and title of the plaintiff to the said estate and premises, and before and at the time when the defendant divulged and communicated the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises to the said *J. H. Taylor*, he, the defendant, was the attorney and solicitor of and for the said *J. H. Taylor*, and had been and was retained and employed by him, as such attorney and solicitor generally in relation to his affairs, and whereof the plaintiff had notice; and thereupon it became and was the duty of the defendant, as such attorney and solicitor, of and for the said *J. H. Taylor*, to divulge and communicate the said defect in, and objection to, the legal right and title of the plaintiff to the said estate and premises, to the said *J. H. Taylor*; and he did on that account, and without malice or any violation of good faith, at the said time, when, &c., divulge and communicate the said defect in, and objection to, the legal right and title of the plaintiff to the said estate and premises, to the said *J. H. Taylor*, with a view, and in order that he might claim and recover the said estate and

premises from the plaintiff, if lawfully entitled thereto, as he then appeared and was believed by the defendant to be; and that, thereupon, the said *J. H. Taylor*, did retain and employ the said defendant as such attorney, to take due and proper proceedings, to try and investigate the said right and claim of the said *J. H. Taylor*, and to recover the said estate and premises for him, and to bring and prosecute the said actions and suits in the declaration mentioned in that behalf; and this the defendant is ready to verify, &c.

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*Demurrer.*—The causes assigned were, that although the defendant confessed and admitted that he had been and was retained and employed by the plaintiff to act for him as his attorney in the premises, and that under and by virtue of that retainer and employment, the said defendant discovered and ascertained the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises; but that, in justice and equity, the beneficial interest in the whole of the said estate and premises, then belonged to the plaintiff; and although the defendant had confessed and admitted that it was his duty, under and by virtue of the said retainer and employment, not voluntarily or unnecessarily to divulge or communicate the said defect and objection to the said *J. H. Taylor*, or to any other person, nor to instigate, or cause, or procure, any action or proceeding for the recovery of the said estate, or any part thereof; yet the defendant had attempted to defend and justify his said illegal conduct, upon and under colour of a wholly untenable ground and pretence; and also, for that although the said plea was pleaded in bar to the whole declaration, yet it did not state or shew any defence, or legal or sufficient justification or excuse, for the said statement and cause of action against the said defendant, for and in respect of his having so wrongfully, maliciously, and dishonourably instigated, and caused and procured the said actions of ejectment to be commenced and prosecuted, and the said other action to be commenced and prosecuted for the said pretended cause of action for cutting down timber, or for having procured to be commenced the said other four actions, and causing the said *J. H. Taylor* to commence and prosecute against the plaintiff, the said untenable suit in the *Exchequer*; and also, for that the said plea was, in other respects, uncertain, informal, and insufficient.

*Joinder.*

*Kelly*, for the plaintiff.—The question is, whether an action can be maintained by a client against his attorney for damages occasioned by a gross breach of duty. In Com. Dig. tit. Action on the Case for a Deceit (A. 5), it is said that an action lies, “if a man being intrusted in his profession deceive him who intrusted him: as if a man retained of counsel become afterwards of counsel with the other party in the same cause; or if he discover the evidence or secrets of the cause.” It is evident that the circumstances disclosed in the declaration shew that the attorney was guilty of a breach of professional duty, and it is one of the most inflexible duties of an attorney that he should keep his client’s secrets. In *Earl of Cholmondeley v. Lord Clinton* (a), Lord Eldon declared that it was the unanimous opinion of all the judges, that an attorney cannot give up his client and act for the opposite party in any suits between them. The plaintiff alleges that he sustained special damage by

(a) 19 Vesey, 261.

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reason of the defendant's conduct; and by the same rule, which prevails in the case of slanderous words which are actionable when special damage is proved, the plaintiff is entitled to recover.

*Jervis, contrd.*—This is not a question whether the Court approves of the conduct of the defendant, who may have acted improperly and indiscreetly, but may not nevertheless be liable in this action. By the rule of law which is established as to confidential communications, the defendant might have been compelled to disclose the defect in a court of justice. In *Wilson v. Rastall (b)*, it is said that the privilege is limited to cases of counsel, solicitor, and attorney; and *Buller, J.*, said that the nature of it was, "that the attorney should not be permitted to disclose, in any action, that which has been confidentially communicated to him as an attorney." *Cobden v. Kewrick (c)*, *Bull. Nisi Prius*, 284. If a party were employed as a steward or money scrivener, and not as an attorney, he would be compelled to disclose a communication, although it was strictly confidential. Here the defendant was employed, not as an attorney, but as a conveyancer, and the same rule is applicable. In *Walker v. Wildman (d)*, it is said that the protection extended not merely to communications made pending an action or suit, but to every communication made by the client to counsel, or attorney, or solicitor, for professional assistance; but that the protection did not extend to cases where the counsel, attorney, or solicitor, was employed in matters not professional, as in a treaty for the purchase of an estate. And the communication must be made to the attorney in his character of attorney, *Bramwell v. Lucas (e)*. The rule laid down in *Cholmondeley v. Lord Clinton (f)*, was qualified in *Robinson v. Mallett (g)*, *Beer v. Ward (h)*, and *Bricheno v. Young (i)*. It is altogether a rule of convenience whether the courts will restrain an attorney or solicitor from acting against parties by whom he has previously been employed, *Grissell v. Peto (k)*, *Johnson v. Marriott (l)*, *Bolton v. Corporation of Liverpool (m)*. Here the defendant was employed as attorney by *J. H. Taylor*, before he was retained by the plaintiff, and the plea avers that the plaintiff had notice of this circumstance: therefore the defendant had a duty to perform to his original client, and conflicting duties presented themselves; in such a case the Court will not interfere.

*Kelly*, in reply.—Even if the defendant succeeded in establishing that he might have been compelled to disclose this defect in the plaintiff's title, in a suit between third parties, it does not therefore follow that this action is not maintainable. In such a case the information is given under compulsion, and the attorney is exonerated from being charged with a breach of duty. But here the disclosure was made voluntarily and unnecessarily. But that the rule as to privileged communications extends beyond communications in respect of a suit, is established in *Greenough v. Gaskell (n)*, *Moore v. Terrell (o)*, and *Cromack v. Heathcote (p)*.

(b) 4 T. Rep. 753.

(c) 4 T. Rep. 431.

(d) 6 Maddox, 47.

(e) 2 B. &amp; Cress. 745.

(f) 19 Vesey, 261.

(g) 4 Price, 353.

(h) Jacob, 77.

(i) Jacob, 300.

(k) 2 Moore and Scott, 568.

(l) 2 Cr. &amp; M. 183.

(m) 1 Mylne and Keene, 88.

(n) 1 Mylne and Keene, 98.

(o) 4 B. &amp; Ad. 870.

(p) 2 Brod. &amp; Bing. 4.

**TINDAL, J.**—It appears to me, that the plaintiff is entitled to maintain this action. It has been contended for the defendant, that the disclosures which he made, were such as his situation of attorney for the plaintiff, would not have entitled him to withhold, if he had been called as a witness in a court of law. It is not necessary to decide that point one way or the other; although, if it were, the cases which have been cited go very far to set it at rest. It is sufficient to say, that the defendant, as an attorney, voluntarily and unnecessarily, disclosed a defect in the plaintiff's title; and it is not necessary to consider what disclosures the defendant might have been compelled to make, if he had stood in the character of a witness. On the general question, there cannot exist a particle of doubt. It was the duty of the attorney to keep sacred the defect which he had discovered in his client's title. The deeds were in his hands for the purpose of raising a loan of money, and when he discovered the defect, he disclosed it to a person who might be benefited by the disclosure. It has been contended, that the defendant was actuated by a sense of duty towards another person, whose attorney he was; and under such circumstances there are some men whose minds are not strong enough to take a safe and decided course. But it would have been an easy course for the defendant to deliver back the deeds to the plaintiff, and to keep his lips sealed, in sacred and solemn silence, to the last moment of his life. Instead of doing this, the defendant has thought proper to disclose the particulars of the defect, to a person who, thereupon, in consequence of the disclosure, has brought actions at law and filed bills in chancery against the plaintiff; and there can be no doubt but that an injury has been sustained, at least to the amount of the extra costs, which have been paid on account of those proceedings. The authority which has been cited from *Comyn's Digest* is very nearly in point to shew that this action may be maintained. It is said that as the plea discloses that the party to whom the communications were made, was the client of the attorney before the disclosures were made, and as they were made without malice, the defendant is therefore excused. I cannot see that this affords an answer, unless it be considered as a waiver on the part of the plaintiff: but the plaintiff could never have expected, when he put his deeds into his attorney's hands, that any defect in the title would have been disclosed to another party. The judgment must therefore be for the plaintiff.

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**GABLER, J.**—If it were necessary to decide whether this could have been considered a privileged communication in the prosecution of a suit, in which the attorney was a witness, I should have desired time to look into the cases. But that question does not arise; for here the disclosures were made without any compulsion; and it is a well established principle, that an attorney shall not voluntarily disclose the secrets of his client. The authority cited from *Comyn's Digest* is sufficient to shew that this action may be maintained.

**VAUGHAN, J.**—The defendant has been guilty of a gross breach of moral duty, and the law is never better employed, than in enforcing the observance of moral duties. The rule as to privileged communications, is much too narrow as laid down by the counsel for the defendant.

**BOSANQUET, J.**—I forbear from entering into a discussion of the cases, as to whether this would be considered a privileged communication, in a suit by

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a third party. I entertain no doubt, but that when a man, who was an attorney, undertook to transact this business for the plaintiff, it was a duty cast upon him by the law, not to divulge the secrets of his employer; as he has done so, he has subjected himself to an action.

Judgment for the plaintiff.

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The admission of a tenant for life to copyhold lands, is the admission of the remainder-man, and the lord of the manor is not entitled to a fine against the remainder-man, unless by virtue of a custom within the manor.

THIS was an action for trespass upon certain closes, named and described by metes and bounds in the declaration; to which the defendant pleaded—1st, that the right of possession in the closes, in which, &c. was not in the plaintiff; and, 2ndly, a special plea of justification, that defendant, as bailiff, and under a warrant from the steward of the manor of *Crowlands*, in the county of *Cambridge*, seized the closes in which, &c. *quousque*, viz. in the mean time and until some person or persons should appear and make good his or their claim to be admitted tenant thereto at a court of the lord of the manor of *Crowlands*.

To this plea the plaintiff replied, that one *John Purchas* was admitted to the closes in question as tenant for life, with remainders over; and that one *Frances Anne Purchas* was seised in remainder under that admittance; and the parties, having joined issue, agreed to submit the following case for the opinion of the Court.

The plaintiff, before the committing of the trespasses by the defendant in which, &c., was, and still is, the tenant and occupier of the lands in question, as tenant to *John Purchas*, Esq., deceased, hereinafter mentioned, and since his decease, to *Frances Anne Purchas*, hereinafter mentioned, daughter of the said *J. Purchas*. The lands in question are copyhold of the manor of *Crowlands*, in the parish of *Dry Drayton*, in the county of *Cambridge*. The fine, payable according to the custom of this manor, is two years' improved annual value, on admission of a tenant of copyhold lands as heir, devisee, or surrenderee.

At a court held for the said manor on the 26th of *January*, 1789, the homage presented the death of *J. Purchas*, the father of the said *J. Purchas*, a customary tenant of the said manor, who held to him and his heirs, divers lands and tenements of the lord of the said manor by copy of court roll; that he died seised thereof; and that, before his death, he duly made and published his last will and testament in writing, bearing date the 23d of *February*, 1786, having duly surrendered the said premises to the uses thereof, whereby the said testator gave and devised unto his son, the said *J. Purchas*, all and singular his copyhold estates, whatsoever and wheresoever, to hold unto the said *J. Purchas*, the son, his heirs, and assigns for ever, upon trust, as soon as conveniently might be after his, the said testator's decease, to sell and dispose of all his said real estate, and to pay the money arising therefrom in such manner as in such will is particularly mentioned; which said *J. Purchas*, the son, being present in court, desired of the lord of the said manor to be admitted tenant, agreeably to the tenor of the said will, to the said premises, being the said closes in which, &c., with other hereditaments, to whom the lord granted seisin of the said premises by the rod, to hold the same to the said *J. Purchas*,

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his heirs, and assigns, agreeably to the tenor of the said will of the lord of the said manor. The trust for sale in the above will was never exercised, the object being to raise £5,000 for the testator's youngest son, and to pay debts, such legacy and debts being paid and satisfied by the said *J. Purchas*, the devisee, out of his own monies, the lord and steward of the manor having no other notice thereof than from the court-books, which are in the terms above specified; on which said admittance the said *J. Purchas*, paid a full fine of two years' improved annual value to the lord of the said manor.

On the 23d of *January*, 1790, the said *J. Purchas* did, out of court, surrender into the hands of the lord of the said manor, (amongst other hereditaments,) the said closes in which, &c., with their appurtenances by the rod, according to the custom of the said manor, by the hands and acceptance of *W. Silk* and *Thomas Silk*, two customary tenants of the said manor in which, &c., to the use and behoof of himself, the said *J. Purchas*, and his heirs, until a marriage then intended between him and one *Sarah F. Barwick*, should be had and solemnized; and from and after the solemnization thereof to the use of himself, the said *J. Purchas*, and assigns, for and during the term of his natural life; and from and immediately after his decease to the use and behoof of the said *Sarah F. Barwick* and her assigns for and during the term of her natural life in augmentation of her jointure; and from and immediately after the decease of the survivor of them, the said *J. Purchas* and *Sarah F. Barwick*, subject and liable to the several powers, provisoes, conditions, limitations, and agreements mentioned, expressed, and declared in a certain indenture of release of four parts, bearing even date therewith, made between the said *J. Purchas* of the first part, the said *S. Barwick* of the second part, *Sarah Tauswell*, of the town of *Cambridge*, grandmother of the said *Sarah*, of the third part, and *John Archdeacon* of the fourth part, to the use of the eldest or only son of the body of the said *J. Purchas* on the body of the said *S. F. Barwick*, and to the heirs of such eldest or only son for ever; and in case there should be no such eldest or only son, then to the use of the eldest or only daughter of the said *J. Purchas* and the said *Sarah*, and to the heirs of such eldest or only daughter for ever; and in default of issue of the marriage, to the use and behoof of the right heirs of the said *J. Purchas* for ever, according to the custom of the said manor.

Afterwards, on the 30th of *May*, 1796, at a general court baron holden before the deputy steward of the manor, the homage of that court presented the said surrender; and at that court the said *J. Purchas* prayed to be admitted tenant to the said surrendered premises, according to the form and effect of the said surrender, to whom the said *S. Smith*, the then lord of the manor, by the said deputy steward, granted seisin thereof by the rod, to hold the same unto the said *J. Purchas* and his assigns for and during the term of his natural life, of the lord of the said manor, and at his will, according to the custom of the said manor; and he the said *J. Purchas* was thereupon admitted tenant of the said surrendered premises, with the appurtenances, for the term of his natural life; and he paid a fine of 1s. on such admission.

The marriage between the said *J. Purchas* and *Sarah F. Barwick* took place in 1790. The only issue of the said marriage was *Frances Anne Purchas*, who is now living, and was of full age at the death of the said *J. Purchas*. The said *S. Purchas* (formerly *Barwick*) died in the lifetime of the said *J. Purchas*, in 1811. The said *J. Purchas* died on the 16th of *November*, 1833.



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On the 10th of *January*, 1834, at a general court baron of the lord of the said manor, holden for the said manor before the steward thereof, the first proclamation was duly made for the heir or heirs at law, or other person or persons entitled to the premises, whereof the said *J. Purchas* had then lately died seised within the said manor, to come into court, and take admission to the same, or that otherwise the same would be seised into the hands of the lord of the said manor for want of a tenant; and the second and third proclamations were made on the 5th of *March* and 9th of *May* of the same year.

On the 17th of *May*, 1834, the then steward of the manor duly issued a warrant, according to the custom of the said manor, under his hand and seal, directed to the said defendant, *Francis Eburn*, the bailiff of the court of the manor, reciting, that proclamations had been duly made at several courts baron, on the 10th of *January*, the 5th of *March*, and the 9th of *May*, 1834, for any person or persons claiming title to the customary or copyhold lands and hereditaments lying within and holden of the same manor, of which *J. Purchas*, Esq., lately died seised, to come into court, and be admitted thereto; and forasmuch as no one came to take up and be admitted to the said lands and hereditaments, it was thereby commanded and ordered, that the said *F. Eburn* do seize, and he was thereby authorized to seize into the hands of the lord of the said manor, all the said customary and copyhold lands and hereditaments, of which the said *J. Purchas* died seised, in the mean time and until some person or persons should appear and make good his or their claim to be admitted thereto. The defendant, under that warrant, entered upon the closes in question, then in the occupation of the said plaintiff, as tenant to the said *Anne Purchas*. The said *F. A. Purchas* is, or claims to be, now seised of the said premises in question, at the will of the said lord of the manor, according to the custom under the surrender of the 23rd of *January*, 1790, and the admittance of the 30th of *May*, 1796.

The question for the consideration of the Court is, whether the said *F. Anne Purchas*, who claims as tenant in remainder, under that surrender and admittance, is bound to come in to be admitted at the lord's court, and is to pay the lord of the said manor a fine on such admittance.

*W. H. Watson*, for the plaintiff. It is a general rule that the admittance of a tenant for life is the admittance of the remainder-man, and that no second fine is payable except by special custom. *Gypp v. Bunney* (a), *Barnes v. Cooke* (b). The case of *Doe d. Whitbread v. Jenney* (c) is similar to the present, except that a special custom there existed in the manor which required the remainder-man to be admitted on the death of the tenant for life, and to pay a fine. In that case Lord *Ellenborough*, C. J., in a very elaborate judgment held, that such a custom was good; and in considering the arguments of counsel upon the other question he said, "the defendant in this case does not object to paying the fine due by the custom from the person to whom the estate is limited in remainder, but contends that the admission of her husband was in law the admission of herself, and that any further admission is nugatory; and that a custom requiring one already admitted to be admitted again, is unreasonable and void. To shew that the admission of the tenant

(a) Cro. Eliz. 504.

(b) 3 Lev. 308.

(c) 5 East, 522.

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for life is the admission of those in remainder. *Brown's case*, 4 Rep. 22 b. was relied on, in which the doctrine is laid down, that the admittance of the tenant for life is the admittance of him in remainder, to vest the estate in him, but not to bar the lord of his fine; and *Auncelm v. Auncelm*, Cro. Jac. 31, where a surrender having been made by a copyholder to *Martha*, his wife, for life, remainder to *Matthew*, his son, in fee, on which *Martha* was admitted, and *Matthew*, the son, without other admittance, having surrendered to the use of the plaintiff, the Court determined in his favour against the heir of *Matthew*, being of opinion that the admittance of the feme, was the admittance of him in remainder, as the particular estate and that in remainder made in law but one estate. And this last case was much relied on, to shew that the admission of the tenant for life, is fully and completely the admission of him in remainder, when designated on the roll, as in the present case the defendant is. On the other hand, it was insisted that where by custom a fine is to be paid by the remainder-man, he is in such a case bound to be admitted, according to the doctrine of Lord *Coke*, in his Treatise on Copyholders, 130, adopted by Lord C. B. *Gilbert*, in his Treatise on Tenures, p. 194, and that the case of *Auncelm v. Auncelm* only proves that the admittance of tenant for life is the admittance of the tenant in remainder, so far as to vest in him the estate in remainder, and enable him to convey a title to it, but that it is not such an admission as to make him full and complete tenant to the lord. And further, that though it should be holden, that where there is no custom, the remainder-man need not be admitted; yet the present defendant was bound to be admitted, there being such custom within this manor, which is the life of copyholds; and that the custom is a reasonable one, as, by means of it, it will appear distinctly upon the rolls of the manor to whom the different copyholds belong, and the lord will be better able to call for his fines, and enforce his suits and services. In addition to the cases mentioned by the plaintiff's counsel, that of *Gypsen v. Bunney*, as reported in *Moor*, 465, may be added, where it is laid down that if a copyhold be surrendered to one for life, remainder to another in fee, if the lord is to have a fine from the remainder-man, there is occasion for a new admittance. But, without deciding whether that be necessary without a custom, we think such custom good, for the reasons suggested by the counsel for the plaintiff."

In the present case, no custom is in existence, and therefore this is a conclusive decision in favour of the plaintiff. So in *The Dean and Chapter of Ely v. Caldecott (d)*, the Court determined that a full fine was only demandable by a remainder-man, by a special custom; and *Blackburne v. Graves (e)* is to the same effect. Here a fine of one shilling was paid by the tenant for life; which must be taken to have been the fine for the whole estate. The lord might have demanded a full fine, if he would; but, having been satisfied with a nominal payment, and the tenant for life having been admitted, it is too late to say that the remainder-man ought to pay a full fine. If the lord now demands an apportioned fine, then he has misconceived his remedy, which is by an action of assumpsit, as in *Dean and Chapter of Ely v. Caldecott (d)*, *Blackburne v. Graves (e)*, and *Lord Kensington v. Mansell (f)*.

(d) 8 Bing. 439.

(e) 1 Mod. 120; 1 Ventr. 260.

(f) 13 Vesey, 240.

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*Kelly, contra.*—It is not necessary for the lord to establish a right to demand an entire fine from the remainder-man; but the question is, whether he is not entitled to be paid a reasonable fine. If the argument on the other side can be established, then the tenants of copyhold estates will have it in their power to defraud the lord of his fines, by creating remainders in perpetuity. It is true that, for many purposes, the admission of a tenant for life has been treated as the admission of the remainder-man, but that has always been qualified thus far,—that, by such admission, the lord shall not suffer in respect of the payment of his fines; *Brown's case* (i). Here the lord does not claim a full fine from the plaintiff, which distinguishes this case from *The Dean and Chapter of Ely v. Caldecott* (k). As to the argument that no special custom is stated in this case, the answer is, that the claim of fines is the creature of custom, in all cases; and here, as a fine of two years improved annual value is payable by custom, the lord now seeks to recover a proportion of that customary fine. Mr. *Watkins* says (l), that if part of a fine only be imposed on the particular tenant, the residue may be assessed on the person in remainder. In *The Earl of Bath v. Abney* (m), it was held that the surviving executor of a term of ninety-nine years, granted of a copyhold, was bound to be admitted tenant, and to pay a fine on admission; and the argument there urged was, “that although where the whole fine had been already paid to the lord upon the first admission, there was no reason why it should be paid over again; but where the fine is not paid for the whole, upon the original admission, then the remainder-man must pay a fine and be admitted.” Here no jury would find that, by receiving one shilling, the lord intended to take it in satisfaction of a full fine; nor can the Court draw any such inference from the facts which are stated. *Doe d. Whitbread v. Jenny* (n) is an authority to shew that the lord has taken a proper remedy by seizing the land; and an action of assumpsit could not have been maintained.

*Watson*, in reply, was stopped by the Court.

TINDAL, C. J.—This case comes before us on a question whether this warrant, which has been issued by the lord of the manor to enforce the payment of a fine, be valid or not. Unless the lord had the right to compel the party to come in and be admitted, the warrant is not valid. The tenant in remainder is already admitted on the roll, by the admission of the tenant for life. The only question then is, whether any fine is demandable from the tenant in remainder, by custom; if it be, the admission of the tenant for life does not bar the claim against the remainder-man. The first observation that arises is, that no statement of any such custom appears in the case. The question is, therefore, reduced to the state of facts which is to be found in the earlier cases on this subject; and there we find it broadly and distinctly laid down, that the admission of the tenant for life is the admission of the remainder-man; and when a fine has been demandable from the remainder-man, it has been by virtue of a special custom. The case of *Doe d. Whitbread v. Jenny* (n) does, in fact, dispose of the present, because the right of the lord to receive a fine

(i) 4 Rep. 22, b.

(k) 8 Bing. 439.

(l) *Watkins on Copyholds*, 292, 296,  
 311.

(m) 1 Burr. 206.

(n) 5 East, 522.

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from the remainder-man rested entirely upon the special custom. Here there was a settlement on the marriage of the tenant for life; he came in, and was admitted, and paid a fine to the lord: it was a nominal fine, it is true, but, as in the case referred to, it was held that a fine is only payable from a remainder-man by custom, I cannot see how the present tenant in remainder can be called on to pay any fine. It is said that this decision will enable copyholders to go on creating remainders in perpetuity, and thereby defeat the lord of his fines; but the answer is, that it depends entirely upon the conduct of the lord himself, whether such a consequence happens. The lord might have refused to admit the tenant for life, unless the full fine was paid. It seems to me, therefore, that this warrant is not sanctioned by the law of copyholds, and our judgment must be for the plaintiff.

GASLER, J.—The case of *Doe d. Whitbread v. Jenny (o)* lays down the rule which is applicable to this question, and I entirely concur in the judgment of my lord chief justice.

VAUGHAN, J.—We could not give our judgment for the defendant, without infringing one of the first principles of copyhold law, namely, that the admission of a tenant for life is the admission of him in remainder. The lord has neglected to do what he might have done, for the purpose of obtaining his fine.

BOSANQUET, J.—I am of the same opinion. The general rule is, that the admission of a tenant for life is the admission of him in remainder. The lord was not bound to admit the tenant for life, without being paid the full fine. The tenant in remainder is already on the rolls; and *Doe d. Whitbread v. Jenny (o)* is an authority to shew, that, after the admission of the tenant for life, the remainder-man cannot be called upon to pay a fine, except by custom. Here, it is true, only a small and nominal fine was taken on the admission of the tenant for life, but we cannot know the ground upon which so small a payment was accepted. It, therefore, seems to me that the lord is not now entitled to compel the tenant in remainder to pay any fine.

Judgment for the plaintiff.

(o) 5 East, 522.

Nov. 15.

## Re ANN SCHOLEFIELD.

The affidavit verifying the certificate of the due taking of the acknowledgment of a married woman, under 3 & 4 W. 4, c. 74, may be made by one of the commissioners, although he be the attorney the transaction.

**M**OTION that the clerk of the enrolments might file the certificate of Mrs. *Scholefield's* acknowledgment of a deed, taken in pursuance of 3 & 4 W. 4, c. 74, secs. 84 & 85. It appeared that one of the two commissioners, was the attorney concerned for Mrs. *Scholefield*, and that he made the affidavit, verifying the certificate, in pursuance of R. *Hil.* T. 1834, (a), and *Trinity* T. 1834, (b).

*Wilde*, Serjt.—The question is, whether this certificate has been verified by a competent person. The officer of the court is doubtful whether the affidavit ought not to be made by some practising attorney, other than the two commissioners; but by a reference to the rule of *Trinity* T. 1834, it is evident that one of the commissioners is competent to make the affidavit. The other

(a) *Hil.* 1834, Reg. 4.—“And it is hereby further ordered, that the affidavit verifying the certificate to be made pursuant to the said act, and which certificate shall be in the form contained in the said act, shall (except in such cases where the acknowledgment shall be taken elsewhere than in *England, Wales, or Berwick-upon-Tweed*,) be made by some practising attorney or solicitor of one of the courts at *Westminster*, or of one of the counties palatine of *Lancaster or Durham*; and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent, (or, if more than one person join in the affidavit,) that one or more of the deponents, knew the person or persons making such acknowledgment, and that, at the time of making such acknowledgment, the person or persons making the same, was or were of full age, and competent understanding, and that one at least of the commissioners taking such acknowledgment, to the best of his deponent's knowledge and belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein, as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit; and that previously to such acknowledgment being taken, the deponent had inquired of such married woman, (or, if more than one, of each of such married women,) whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has

no reason to doubt the truth of such declaration, and he verily believes the same to be true: and where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said (judge, master, or) commissioners.”

(b) *Trin.* 1834.—“It is ordered, that from and after the last day of this term, where such parts of the affidavit verifying the certificate of acknowledgment, taken in pursuance of the late act of parliament respecting fines and recoveries, as state the deponent's knowledge of the party making the acknowledgment, and her being of full age, cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made, shall consider competent so to do. And it is further ordered, that where more than one married woman shall, at the same time, acknowledge the same deed respecting the same property, the fees directed by the said rules to be taken, shall be taken for the first acknowledgment only; and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one-half of the original fees; and so also where the same married woman shall, at the same time, acknowledge more than one deed respecting the same property; and where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit. In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.”

commissioner is required to be a person not interested in the transaction, and that is a sufficient protection against fraud. The Court expressly permits the attorney of the interested party to be one of the commissioners, and it is considered that the presence of one indifferent commissioner is sufficient. If a third party, who must be a practising attorney, is required to make the affidavit, then much inconvenience and expense will result from such a construction of the rules.

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Mr. *Sherwood*, the officer whose duty it is to file the certificates, stated that it had been usual to require the affidavit to be made by an attorney, who was not one of the commissioners, when it was practicable to obtain his attendance.

TINDAL, C. J.—I think there can be little doubt that the primary object of the rules was to obtain the treble sanction of two commissioners, and a practising attorney; but I remember some objection was made when the rules were first framed, because it was found inconvenient to require one of the commissioners to make the affidavit (*c*), and then the Court allowed the affidavit to be made by some practising attorney or solicitor. That was also found inconvenient in practice; and the rule of *Trinity* Term was promulgated. That seems to contemplate, that when it is convenient to do so, one of the commissioners may make the affidavit. This certificate may therefore be enrolled.

GASELEE, J., and VAUGHAN, J., concurred.

BOSANQUET, J.—I recollect that it was first proposed that the commissioners should in all cases make the affidavit: that was said to be inconvenient, and the rules were then drawn up as they now stand.

Rule accordingly.

(*c*) By the rules of *Michaelmas* T., 1833, T. 1834, one of the commissioners was expressly allowed to make the affidavit.

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DEBT on an agreement. The declaration stated that, by certain articles of agreement, made and entered into between the said defendants, described as owners of the ship *Offley*, of the one part, and the said plaintiff, of the other part; which said articles of agreement were sealed with the respective seals of the said defendants, but being in the possession of the said defen-

By an agreement under seal, it was recited that the defendants had fitted out a ship for the whale-fishery, and had ap-

pointed the plaintiff to be master upon the terms thereafter mentioned; the plaintiff then covenanted that he would proceed on the voyage, and obtain as good a cargo as might be within his power; that he would obey the owner's instructions; be as frugal as possible with the stores and provisions, and would not suffer any illegal acts on board the ship; the defendants then covenanted, "that on the performance of the before-mentioned terms and conditions, on the part of the plaintiff," they would pay a certain portion of the net proceeds of the voyage to the plaintiff. In debt upon this agreement, for not paying the plaintiff his share of the proceeds of the voyage, the defendants pleaded that the plaintiff had not obtained as good a cargo as was within his power; that he had not obeyed instructions, &c.:—*Held*, that the pleas were no answer to the action, because the performance of the covenants, by the plaintiff, was not a condition precedent; and that a cross action was the remedy for the defendants.

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dants, the said plaintiff cannot bring them into court; after reciting that the said defendants, as owners of the said ship *Offley*, had fitted out the same with all necessary stores, provisions, casks, and other implements, for the prosecuting of a voyage to the southern whale fishery, and had appointed the plaintiff to be master of the said vessel, on the terms and conditions therein-after mentioned. It was, by the articles of agreement, witnessed, and the said parties did thereby mutually covenant and agree, to and with each other, in the manner following; that is to say, the said plaintiff did thereby covenant, promise, and agree, to and with the said defendants, that he, the said plaintiff, would take upon himself the command of the said ship, and proceed in her, as soon as she was ready for sea, to the southern whale fishery, and procure a cargo of sperm oil, head matter, ambergris, whale oil, seal skins, or any other produce, or as great a proportion thereof, as might be under all circumstances within his power to obtain; and, having done so, should and would return in and with the said ship to the port of *London*, and there, at his own costs, together with the said crew, discharge and deliver to the said defendants whatever cargo the said vessel might have on board; and also that he, the said plaintiff, should and would obey such instructions, relative to the said vessel and her voyage, as might from time to time be received by him from the said defendants; and likewise should and would be as frugal as possible with the stores and provisions of the said ship, and regularly enter in a book, to be provided for the purpose, the expenditure and appropriation thereof, and not dispose of any part of them without faithfully accounting with the said defendants for the produce thereof; and, further, that he would not, on any account or pretence whatsoever, smuggle or trade, nor permit it directly nor indirectly, whereby the said ship, or the owners thereof, might be prejudicially affected; nor consent nor suffer to be committed, with his knowledge, any illegal act or acts on board the said ship, whereby the owner or owners might be injured; and he thereby engaged and bound himself to indemnify, in case of such an event, the said owners from and against any claim, loss, or damage, which they might sustain thereby: and the said plaintiff thereby engaged, on all occasions, to act for the interests of the said ship and owners, according to the utmost of his judgment and abilities; and the said defendants did thereby covenant, promise, and agree, *that on the performance of the before-mentioned terms and conditions on the part of the said plaintiff*, they, the said defendants, should and would pay, or cause to be paid, unto the said plaintiff, a sum of money equal to one-twelfth part of the net proceeds which might be received from the sale of the cargo, after deducting the cost of the casks sold with the cargo of the ship, and all custom-house expenses, lighterages, pierages outwards and inwards, convoy, dock, and all other duties, which were or might thereafter be imposed on ship or cargo, or either of them, together with lighterage, landing, wharfage, guaging, coopering, commissions, and all other charges and expenses, attending the landing and sale of the said cargo, together with the account of any disbursements for refreshments or fresh provisions, which might have been made during the voyage by the said master; and, further, the said defendants agreed to allow to the said plaintiff one per cent. upon the aforesaid net proceeds, after the above recited deduction had been made therefrom. And the said plaintiff took upon himself the command of the said ship, and proceeded in her to the southern whale fishery, and pro-

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cured for the said ship, a cargo, to wit, 374 tons of sperm-oil, head-matter, ambergris, whale-oil, seal-skins, and other produce, of great value, to wit, of the value of 10,000*l.*, being the best cargo that, under all the circumstances, it was in the power of the said plaintiff to obtain; and that the said cargo, being so obtained, he, the plaintiff, returned to and arrived at *London*, and delivered to the defendants the said cargo aforesaid; that he, the plaintiff, during the voyage aforesaid, obeyed all instructions relative to the said vessel and her voyage, from time to time received by him from the defendants, and was as frugal as possible with the stores and provisions of the said ship, and regularly entered, in a certain book provided for that purpose, the expenditure and appropriation thereof, and faithfully accounted to the defendants for the produce of every part of the stores and provisions aforesaid, by the said plaintiff disposed of during the said voyage; that he, the plaintiff, during the said voyage, did not smuggle or trade, nor permit it directly or indirectly, whereby the said ship or owners might be or were prejudicially affected, and did not consent or suffer to be committed, with his knowledge, any illegal act or acts on board the said ship, whereby the owner or owners might be injured; but, on the contrary thereof, he, the said plaintiff, on all occasions, acted for the interest of the said ship and owners to the utmost of his judgment and abilities; of all which said several premises, the defendants had notice. *Averment*—that the cargo was sold by the defendants, whereby an action had accrued to the plaintiff to recover 500*l.*, being one twelfth part of the net proceeds of the sale, and also 60*l.*, being one per cent. on the net proceeds of the sale. *Breach*—that the defendants had not paid the said two sums of money to the plaintiff.

Counts for work and materials; money paid; money received by the defendants; and on an account stated.

*Pleas* to the first count—first, that the said cargo, so procured for the said ship, was not the best cargo that, under all the circumstances, it was in the power of the plaintiff to obtain. Conclusion to the country.

Second, that after the making of the agreement, and before the commencement of the said voyage, the plaintiff received from the defendants certain instructions relative to the said vessel on her said voyage, whereby the defendants instructed the plaintiff, among other things, during the said voyage, to pay the strictest attention to the preservation of the stores of all kinds belonging to the said ship, and to be careful in bringing the said ship and remaining stores home, in the best possible order for undertaking a future voyage; and also, that the said plaintiff should cautiously abstain himself, and strictly prohibit all on board the said vessel, from engaging in any sort of trade whatsoever; and also that he, the plaintiff, should studiously avoid putting in any where, except when urgent and unavoidable necessity compelled him to do so; and also that the plaintiff should use his best exertions to obtain, in the least possible time, a full cargo for the said ship or vessel, and endeavour to maintain order and regularity therein, and to promote the health and comfort of all on board the said vessel during the said voyage; that the plaintiff disobeyed the said instructions in this, to wit, that he did not, during the said voyage, pay the strictest attention to the preservation of the stores of all kinds belonging to the said ship, and was not careful in bringing the remaining stores home in the best possible order for undertaking



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a future voyage; but, on the contrary thereof, during the said voyage, did carelessly, negligently, and wilfully damage, and suffer to be damaged, certain stores which had been and were provided, and were during the said voyage the stores of the said ship, and which were not used during the said voyage, whereby the same were rendered unfit for undertaking a future voyage; and that the plaintiff also disobeyed the said instructions in this, to wit, that he did not cautiously abstain from engaging in any sort of trade whatsoever; but, on the contrary thereof, during the time aforesaid, on divers days during the said voyage, was engaged in trade, and did trade for his own personal advantage; that the plaintiff also disobeyed the said instructions in this, to wit, that he did not avoid putting in any where, except when urgent and unavoidable necessity compelled him so to do; but, on the contrary thereof, wholly neglected so to do, and during the said voyage put into divers, to wit, ten ports and ten harbours, and stayed and continued therein for divers long spaces of time, that is to say, for two months in each of the said ports and harbours, although not compelled by any urgent or unavoidable necessity so to do; that the plaintiff also disobeyed the said instructions in this, to wit, that the plaintiff did not use his best exertions to obtain, in the least possible time, a full cargo for the said ship or vessel, and did not, during the said voyage, maintain order and regularity in the said vessel, or promote the comfort of all who during the said time were on board the said vessel; but, on the contrary, the said plaintiff on divers days and times during the said voyage, to wit, on, &c., was drunk and intoxicated, and caused and suffered disorder and irregularity in the said vessel, although he might and could then have maintained order and regularity therein; that the plaintiff, during the said voyage, also disobeyed his said instructions in this, to wit, that during the whole of the said voyage, he rendered the said vessel and the said voyage uncomfortable to the crew, who during that time were on board the said vessel. Conclusion with a verification.

Third,—that during the said voyage, to wit, on, &c., the plaintiff did trade in such a manner that the owners of the said ship were prejudicially affected thereby. Conclusion to the country.

And as to the declaration, so far as it related to the non-payment of the said sum of money, in which the defendants are alleged to be indebted to the plaintiff for the price and value of work done by the plaintiff for the defendants, at their request, the defendants say that the said work was done by the plaintiff, for the defendants, in and about the taking upon himself the command of the said ship in the said first count mentioned, and proceeding in her to the southern whale fishery, as in the first count mentioned, and procuring for the said ship a cargo, and in returning in the said ship, and in the command thereof, to the port of *London*, and there discharging and delivering to the said defendants the said cargo; and that such work was done and performed by the plaintiff, for the defendants, under and by virtue of the said articles of agreement in the said first count mentioned; and that the said plaintiff did, during the said voyage, to wit, on, &c., trade in such a manner that the owners of the said ship were prejudicially affected thereby. Conclusion with a verification.

*General demurrer and joinder.*

*Whateley*, in support of the demurrer.—These pleas put matters in issue which are not traversable. They shew facts which may give the defendants

a remedy by cross-action, but they do not afford a defence to this action. The question is, whether the performance of the terms of the agreement by the plaintiff is a condition precedent to his right to recover. Now the covenants go only to a part of the consideration, and therefore this is not a condition precedent. The authorities upon this point are collected in *Portage v. Cole* (a). *Boone v. Eyre* (b) is a leading case; there an action of covenant was brought on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the *West Indies*, together with the stock of negroes upon it, in consideration of 500*l.* and an annuity of 160*l.* per annum for his life, and covenanted that he had a good title to the plantation, and was lawfully possessed of the negroes; and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff, well and truly performing all and every thing therein contained on his part to be performed, he, the defendant, would pay the annuity. The breach assigned was the non-payment of the annuity. The defendant pleaded that the plaintiff was not, at the time of the making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey. On a demurrer to this plea, Lord *Mansfield*, C. J., said, "The distinction is very clear; where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff, would bar the action." That decision has been confirmed by several subsequent cases:—*Hall v. Casenove* (c), *Campbell v. Jones* (d), *Davidson v. Gwynere* (e), *Ritchie v. Atkinson* (f), *Carpenter v. Creswell* (g), *Constable v. Colerbie* (h). In the present case, the voyage has been performed; and, if the agreement amounts to a condition precedent, then, if the plaintiff has wasted a single cask of biscuits, or has lost one day during the continuation of the voyage, he will not be entitled to receive any thing from the defendants. Therefore, it is a reasonable rule which is established, that unless the non-performance alleged in the breach of the contract, goes to the whole root and consideration of it, the covenant is not a condition precedent. In *Puller v. Staniforth* (i), where, by the terms of a charter-party, the captain was required, after he had received a cargo on board at *St. Petersburg*, immediately to proceed and return to *London* with the cargo, Lord *Ellenborough*, C. J., held, that this was not a condition precedent, and he said, "Many circumstances might occur to make it prudent, and for the interest of all concerned, that the captain should touch at some port in his way home, should dispose of the outward cargo, and should get a freight home. If he were to do it improperly, he would be answerable in damages for whatever injury his misconduct should occasion, so that justice would be done to the freighters, though this were not held a condition precedent; and the holding it to be a condition precedent might, in the case I have just put, be extremely prejudicial to them. Indeed, if it were a condition precedent, the putting into a port for

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(a) 1 Wms. Saund. 320, (b).

(b) Cited in *Duke of St. Albans v. Shore*, 1 H. Black. 273, (a).

(c) 4 East, 483.

(d) 6 T. R. 570.

(e) 12 East, 389.

(f) 10 East, 295.

(g) 4 Bing. 409.

(h) Palm. 397.

(i) 11 East, 232.

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a single hour, or parting with a single pig of the lead, would be a breach, and would take away from the captain all right to his 2500*l.*, although such act of the captain were in ever so slight a degree injurious to the interest of the freighters, and might be compensated by trifling damages; and so would any deviation or disposal of the cargo be, however beneficial it might be to the freighters. As, however, the words do not import that this is a condition precedent; as the nature of the thing does not require that it should be so held; as great prejudice might result to the freighters from so holding, and as they will be entitled to indemnity for any damage, though it be not so held, we are of opinion that it is not to be deemed a condition precedent." And the Court, in considering whether there be a condition precedent, will collect the intention of the parties, as it is to be found in the whole instrument, and not by putting a forced construction upon a few words.

*R. V. Richards, contra.*—A fishing voyage is an undertaking which obliges the adventurers to incur great expense before they can realize a profit; and the success of it mainly depends upon the conduct and management of the captain of the ship. Therefore, it has become the practice to pay the captain for his services by giving him a share of the proceeds of the voyage; and also to guard against misconduct on his part, by making it a condition precedent to payment, that he shall have performed all the terms of his agreement. The intention of the parties must be ascertained by looking at the words which are used. Here the words in the covenant to pay, are very strong. The defendants covenant to pay, "on the performance of the before-mentioned terms and conditions on the part of the plaintiff." Upon this argument the facts stated in the pleas must be taken to be true; and then it will appear that there has been a substantial infringement of the condition. It would be a question for the jury, upon an issue being raised on these pleas, whether a substantial injury had been inflicted on the defendants by the alleged misconduct of the plaintiff. In *Rose v. Poulton (k)*, *Trautman, J.*, said, "There is a well-known distinction, between cases where the consideration for doing a thing is the doing of some other thing, and where it is merely the covenanting to do such thing." In *Glazebrook v. Woodrow (l)*, *Lord Kenyon, C. J.*, speaking of this class of cases, says, "The general rule which governs them all is, that every man's agreement is to be performed according to his intent, as far as that is to be collected from the particular instrument. Now here the case is, that the plaintiff, being in possession of a school, covenanted with the defendant to convey to him the good will of it, (if I may use the expression), and the building itself, on or before the 1st of August, 1797, and, in the mean time, he consented to put him in possession of the premises on some prior day; on the other hand, the defendant engaged to pay him a stipulated price, in consideration of all that the other had undertaken to do, on or before the same 1st of August; and now the plaintiff, who is to execute the conveyance, and who is also the person to pay for it, not having made it, or made a tender of it to the defendant, nevertheless calls upon him by this action to pay the consideration money. The very statement of such a claim is enough to refute it. If these be not dependent covenants, it is difficult to conceive what covenants are so. The very substance of the consideration to

(k) 2 B. & Ado. 831.

(l) 8 T. Rep. 366.

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entitle the plaintiff to receive the money, was the making of the conveyance required, and it is admitted that he has not done it; that makes an end of the question." The intention of parties must be collected from the whole of the instrument; and if the intention of these parties may be seen to be, that the performance of the terms of the contract, by the plaintiff, is a condition precedent, the Court will give effect to it, without reference to the consequences which may follow. In the contracts which were under consideration in the cases referred to, the defendants' promises were made "in consideration" of the plaintiffs' covenants, and not as here, "on the performance" of the covenants. In *Boone v. Eyre* (l), the substantial part of the plaintiffs' contracts had been performed.

*Whateley*, in reply.—The Court will ascertain the intention of the parties, as it may be collected from all the circumstances of the case, as was said by *Ashurst, J.*, in *Hotham v. East India Company* (m), "There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent, neither doth it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant, for the same words have been construed to operate as either the one or the other, according to the nature of the transaction. The merits, therefore, of the question, must depend on the nature of the contract and the acts to be performed by the contracting parties, and the subsequent facts disclosed on record which have happened in consequence of this contract." So in *Porter v. Shepard* (n), by Lord *Kenyon, C. J.*—"It has frequently been said, and common sense seems to justify it, that conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties to be collected from the instrument, and that technical words (if there be any to encounter such intention, and there are none in this case,) should give way to that intention." No person would be so foolish as to enter into a contract upon the terms contended for by the defendants. If the plaintiff has misconducted himself, a cross-action may be maintained, and justice will be done between the parties. In *Rase v. Poulton* (o), the Court held that the covenants were independent; and the agreement in *Glazebrook v. Woodrow* (p) was very different from the present, and clearly distinguishable. Here the substantial part of the contract has been performed by the plaintiff, because a cargo has been obtained and brought home; and, therefore, this case is not distinguishable from *Boon v. Eyre* (l) upon that ground. In *Hunlocke v. Blacklowe* (r), the agreement was made by the defendant in consideration of the performance of the covenant by the plaintiff, and it was nevertheless held not to be a condition precedent.

Cur. adv. vult.

*TINDAL, C. J.*—The demurrer to the pleas of the defendant raises the question, whether the performance of the covenants entered into by the plaintiff in the articles of agreement on which this action is founded, forms a condition precedent to the plaintiff's right to recover on the covenants entered into by the defendants. The rule has been established by a long series of decisions

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(l) 1 H. Black. 273, (a).

(m) 1 T. Rep. 645.

(n) 6 T. Rep. 668.

(o) 2 B. &amp; Ado. 822.

(p) 8 T. Rep. 366.

(r) 2 Wms. Saund. 155 a.

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in modern times, that the question, whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties, as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention has been laid down, with great accuracy, by Lord *Ellenborough*, in the case of *Richie v. Atkinson* (s), to be this, that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it; but it is not a condition precedent.

Now, applying that distinction to the consideration of the covenant in question, we think the necessary inference is, that it was not the intention of the contracting parties that any of the covenants entered into by the plaintiff, the captain of the ship, should form a condition precedent to his right to recover on the covenant entered into by the defendants, the ship-owners, for his stipulated remuneration. Thus, for instance, if the covenant to procure a cargo of sperm oil, &c., or as great a proportion thereof as might be, under all circumstances, within the power of the plaintiff to obtain, be held to be a condition precedent, a very small and trifling deficiency from the best possible cargo, if attributable to any, the slightest, carelessness on the part of the plaintiff, would occasion the total loss of all his profits of the voyage; whereas, if the breach of the covenant were made the subject of an action by the defendants, the compensation to them for such breach, would correspond exactly with the extent of the injury. The same observation applies, in a still stronger degree, to the non-performance of the several other covenants set out and relied upon in the second and last pleas, which covenants might be broken to the letter, with very little damage resulting therefrom to the ship-owner; whilst, on the other hand, by treating them as conditions precedent, a trifling injury to one party, would occasion the loss of all the remuneration to the other, for long and laborious service. The parties to such a contract may, undoubtedly, if they think proper, agree that the captain's right to recover any remuneration for his services, shall be conditional only, and shall depend on his strict performance of the covenants he enters into; and if words are used in the contract, so precise, express, and strong, that such intention, and such intention only, is compatible with the terms employed, however inconsistent it may be with general principles of reasoning, a court can only give effect to such declared intention of the parties. The only question in every particular case is, whether such intention is so declared. In this case, it is insisted, on the part of the defendants, that such must be considered to be the intention, for that the defendant's covenant is entered into with the plaintiff, not simply in consideration of the plaintiff's covenants and agreements, but "on the performance of the before-mentioned terms and conditions on the part of the plaintiff;" which words, it is argued, must, of necessity, shew the intention that the performance by the plaintiff must be a condition precedent, and not rest in covenant merely. And if this were *res integra*, the argument would undoubtedly be strong. But, in the case of *Boone v. Eyre* (t), the leading case on this subject, and in which the distinction before adverted to is first clearly established, the

(s) 10 East, 295.

(t) 1 H. Bl. 273 a.

defendant covenanted, that, "the plaintiff well and truly performing all and every thing therein contained, on his part to be performed," he, the defendant, would pay the annuity. In that case, the performance of the plaintiff's covenant is made the consideration for the defendant's liability, according to the strict technical frame of the agreement; but in that case it was held, that the obvious intention of the parties was opposed to it; and such intention was allowed to prevail. The case, also, of *Hunlocke v. Blacklowe* (\*), is strong to shew that courts of justice are more anxious to discover and to be governed by the intention of the parties, than to follow the strict and technical form of words used in the instrument. We think, therefore, the authorities enable us to give effect, in this case, to that which appears to us the intention of the parties, namely, that the ship-owners should have their remedy in damages on the covenants entered into by the captain, for any loss occasioned by the breach thereof; but that a failure in the full and literal performance of those covenants, on the part of the captain, should not be set up by the ship-owners as an answer to an action on their own covenants. And we therefore give

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Judgment for the plaintiff.

(\*) 2 Wms. Saund. 155(a).

### BENNETT v. SMITH.

Nov. 22.

SEWELL obtained a rule nisi to set aside a judgment, for irregularity. The declaration was filed on the 26th of *October*, and a rule to plead in eight days was entered on the same day. The defendant, who resided at *Liverpool*, was not served with notice of declaration until the 28th of *October*. The irregularity complained of was, that the rule to plead had been entered too soon. It appeared, by affidavit, that the defendant's agents in *London*, having received information of the service of the notice of declaration, searched the office for a rule to plead, but found that no rule had been entered on or after the 28th of *October*; and that, in consequence, they did not plead to the action. On the 12th of *November*, judgment was signed for want of a plea.

A rule to plead entered before notice of the declaration has been served upon the defendant, is irregular.

*Crowder* shewed cause.—It is the usual practice to enter a rule to plead, the same day that the declaration is filed. If it is necessary to ascertain when notice of declaration was served, before a rule to plead can be entered, much delay and inconvenience will arise, especially in cases where defendants reside in the country. The judgment has not been signed until long after the expiration of eight days from the service of the notice of declaration.

*Sewell, contrâ.*—In *Archbold's Practice*, it is said (a), "A rule to plead cannot be entered before the declaration is delivered or filed, and notice given, or it will be irregular." And a declaration, when it is filed, is only a good declaration from the time when notice is given. *Weedle v. Brazier* (b), *Hutchinson v. Brown* (c).

(a) 4th ed. 228 and 235, citing *Perry v. Fisher*, 6 East, 459.

(b) 1 Dow. P. C. 639.  
(c) 7 T. Rep. 298.

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TINDAL, C. J.—We will inquire what the practice is in the other courts.

On a subsequent day, (*November 24th.*) the Court made the rule *absolute*; and said, that, by the practice in the other courts, the rule to plead could not be left at the office before notice of the declaration had been served.

Rule absolute.

Nov. 22.

## Experte GROVE.

The commissioners for taking acknowledgments, under 3 & 4 W. 4, c. 74, have a lien for their fees on the documents perfected before them; but one commissioner cannot set up the lien of the other without being duly authorized to do so.

A RULE nisi had been obtained, calling upon Mr. *Roberts*, one of the commissioners for taking the acknowledgments of married women under 3 & 4 W. 4, c. 74, to deliver up a deed which had been acknowledged before him, and also the affidavit and verification, and other documents relating thereto.

When cause was shewn, the following appeared, by the affidavits, to be the facts of the case:—Mr. *Roberts* and Mr. *Collins* were applied to, as commissioners, by the attorney of Mrs. *Grove*, to take her acknowledgment of a deed under the statute; and, after the acknowledgment had been taken, Mr. *Roberts*, who had possession of the deed, was applied to for the usual affidavit of verification. He made the affidavit, but refused to deliver up the deed, until his fee for taking the acknowledgment, was paid. The attorney then tendered the fee, whereupon Mr. *Roberts* inquired whether Mr. *Collins* had been paid; and, ascertaining that he had not, he said he should keep the documents until both fees were paid. Upon a subsequent application being made, Mr. *Roberts* said he had then been personally requested, by Mr. *Collins*, to withhold the documents; and it appeared, that, before the rule nisi was obtained, Mr. *Roberts* had given the documents to Mr. *Collins*.

*Whateley* shewed cause.—First, this application should be against Mr. *Collins*, who has the possession of the documents, and who held them when this rule was obtained. Secondly, Mr. *Roberts* was justified in detaining them until his own fee was paid, as it is clear that, at common law, an attorney has a lien on every deed or paper delivered to him to do any work thereon. *Hollis v. Claridge* (a). So, in *Blackbourn v. Brown* (b), it was held, that the clerk of the warrants might refuse to file the warrant, or pass a fine, until the attorney concerned for the parties had paid his term fees. And, if Mr. *Roberts* had such a right of lien for his own fee, he had also a similar right to detain until the other commissioner's fee was paid, especially as he had been authorized to procure it.

*Humfrey*, in support of the rule.—A right of lien is a personal right; and it may be admitted, for the sake of argument, that each commissioner might have detained these documents until his own fee was paid; but when Mr. *Roberts*'s fee was tendered to him, he was bound to give up the documents, especially as he does not appear, at that time, to have received any authority from Mr. *Collins* to set up any right of lien on his account. The detention until both fees were paid, was the suggestion of *Roberts*'s own mind.

(a) 4 Taunt. 807.

(b) 1 Bing. 277.

TINDAL, C. J.—It is clear that these two gentlemen had a lien on these documents for their fees, whilst they remained in their joint possession; and it is also clear, that, if they remained with one of them, and he were duly authorized by the other to detain them until his fee was paid, the lien would still exist. In the absence of this right, the commissioners would be without a practicable remedy to recover their fees. But here there is a point of time uncovered by the affidavit. *Roberts* had a right to detain until his own fee was paid, but it was not until after he had set up *Collins's* lien, that he received *Collins's* authority to do so. His own fee was tendered; and he was not authorized to detain the documents by *Collins*. The rule must be made absolute, but without costs.

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GASBLEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule absolute.

### STANNARD v. ULLITHORNE and another.

Nov. 25.

C. CLARKE, obtained a rule nisi, for a particular of the plaintiff's demand in an action against the defendants, who were attornies, for negligence in preparing a conveyance of certain premises, from the plaintiff to one *James*. It appeared that, in 1829, the defendants prepared a conveyance of a moiety of the premises from the plaintiff to *James*; and soon afterwards a conveyance of the other moiety. *James* being, in a short time, ejected from one of the moieties, he thereupon sued the plaintiff upon his covenant for quiet enjoyment; and the plaintiff brought an action for negligence against the defendants, and recovered the damages and costs which he had paid to *James* (a). *James* having since been ejected from the other moiety of the premises, and having in like manner obtained a verdict against the plaintiff upon a similar covenant in the deed of conveyance of that moiety; the present action was brought to recover the damages and costs which the plaintiff had paid to *James* in the last suit.

In an action against an attorney for negligence, the Court refused to order the plaintiff to give a particular of his demand.

*Wilde*, Serjt., shewed cause.—The particulars of the plaintiff's demand appear with sufficient certainty on the face of the declaration. It appears, by affidavit, that the plaintiff offered to shew the defendants the bill of costs which had been incurred in defending the last action brought by *James*. In actions on the case, it is not usual to give a particular of demand, except under very special circumstances, which do not exist here.

*Clarke, contrâ*.—This is a question of a complicated nature, and it is impossible for the defendants to know in respect of what breach of duty the action is brought. In the *King v. Curwood* (b), it was thought reasonable that a prosecutor on an indictment for a nuisance, should give a particular of the acts of nuisance which were complained of.

TINDAL, C. J.—It is very unusual to give a particular in such a case as this. This declaration seems to disclose the nature of the plaintiff's claim

(a) See 10 Bing. 491.

(b) 1 Har. & Woll. 310.



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with sufficient certainty, and I cannot see any reason for departing from the usual course. It is not stated in the defendants' affidavit, that they are unable to defend the action without a further statement of the claim. It appears that a copy of the bill of costs, which the plaintiff has paid, was offered and refused. The rule must be discharged.

GASLEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule discharged.

Nov. 25.

WILLIAMS and another v. SHARWOOD and another.

Where a defendant pleads various pleas, to parts of the sum mentioned in the declaration, and also pays money into court, and the plaintiff enters a *nolle prosequi*, as to the pleas of payment, the defendant is entitled to his costs, under sec. 33, 3 & 4 W. 4, c. 42.

Where various defences are pleaded to one demand, and the plaintiff enters a *nolle prosequi*, he is liable to the costs of all the pleas.

**M**OTION to review the Prothonotary's taxation of costs. The action was in assumpsit, and the declaration was for 3,000*l.* goods sold, 3,000*l.* money lent, and 3,000*l.* on an account stated. By the bill of particulars, the plaintiffs claimed 1,920*l.*, and gave credit for 483*l.*, leaving a balance of 1,437*l.* as being due.

The defendants pleaded, first, as to all the sums in the declaration, except 1,100*l.*, non-assumpsit. Then followed twenty-five pleas of payment of various parcels of the sum demanded, by payments before and after the action, of various sums which became due on certain bills of exchange. The 27th was a plea of payment of 820*l.*; the 28th, a plea of set-off to the whole declaration, except the money paid into court; and the 29th, a plea of payment into court of 1,100*l.* After these pleas were pleaded, the plaintiffs applied to a judge at chambers, to strike out some of the 25 pleas; but, after hearing the parties, all the pleas were allowed; but a suggestion thrown out by the learned judge, to incorporate the various sums alleged to be paid, into a statement by way of a particular of what the defendants might be allowed to prove, was acceded to by both parties, to save the expenses of a long record and for the sake of convenience; and the twenty-five pleas were accordingly struck out of the record; but it was also agreed, that the parties were to be in the same situation, with respect to costs and evidence, as if all the pleas had remained upon the record.

The plaintiffs entered a *nolle prosequi*, on the 1st, 27th, and 28th pleas, and took the money out of court which had been paid in under the 29th plea. On the taxation of the costs, the prothonotary allowed the defendants the costs of all the pleas except the 29th.

*Kelly*, on behalf of the plaintiffs, moved that the taxation might be reviewed. The prothonotary has allowed these costs in pursuance of 3 & 4 W. 4, c. 42, sec. 33, which directs, "That where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendants shall be entitled to, and have judgment for, and receive his reasonable costs in that behalf." Two questions arise, first, whether the defendants are entitled to any costs at all; secondly, whether they are entitled to more than the costs of one of the pleas, which goes to the whole demand. The first question arises on the construction which the Court will put upon the words of the statute, and whether this is the case of a *nolle prosequi*, entered "as to part of the

declaration." The plaintiffs claimed one entire sum in the declaration, and have entered the *vol. pros.* as to part only of that sum. If the statute be held to apply, then the plaintiff will, in all cases, be compelled to declare for the exact sum which is due to him, or be liable to costs. The second question is a very important one. For the advantage of the defendants, twenty-nine pleas were placed on the record; although three of the pleas, viz.—non-assumpsit, set-off, and payment, would have afforded a sufficient answer to the plaintiffs' claim. The expense of all the pleas now falls upon the plaintiffs. If the defendants had gone to trial, they could not have recovered on all the issues which were raised, but, notwithstanding that, they are now allowed their full costs.

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*Wightman* shewed cause in the first instance.—The plaintiffs have made a claim which they are unable to establish; and as a judge at chambers allowed all the pleas to be pleaded, it is now too late to review that decision; and the statute clearly gives the defendants the costs which the prothonotary has allowed. If the plaintiffs had been more precise in making their claim, then the extra number of pleas would not be required. The sums stated in the declaration, are as much a part of it, within the meaning of the statute, as any other allegation.

TINDAL, C. J.—There is no doubt but that the defendants are entitled to some costs under the 33rd section of the statute; the words "reasonable costs" are used, and the only question is, whether, after the defendants have put in three separate answers to the demand, they are entitled to the costs of all the defences. But we should be introducing a very inconvenient discussion, if, after a *nolle prosequi* is entered, we allowed parties to discuss the propriety of the allowance of several pleas. If they were improperly allowed, the plaintiffs ought to have applied to the Court to set them aside.

GASELEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule discharged.

WM. WILSON and ESTHER his Wife v. LAINSON and another.

Nov. 19.

TRESPASS for the assault, battery, and false imprisonment of the plaintiff's wife. *Pleas*—first, Not guilty; secondly, that *Esther Wilson* was not the wife of the plaintiff, *William Wilson*; thirdly, as to the assault and false imprisonment, the defendant, justified under the authority of a writ of *capias*, issued against the said *Esther*, at the suit of one *Upton*. At the trial, before *Bosanquet, J.*, a verdict was found for the plaintiffs, on the first and second

In an action for assault, battery, and false imprisonment of the plaintiff's wife: The defendant pleaded, first, Not guilty;

secondly, that the party was not the plaintiff's wife; thirdly, a justification. A verdict was found for the plaintiff, with one farthing damages on the two first issues, and for the defendant on the third:—*Held*, that the judge was authorized to give a certificate to deprive the plaintiff of his costs, under 43 Eliz. c. 6.

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counts, damages, one farthing; and for the defendants on the third count. The learned judge certified at the trial, under the 43 Eliz. c. 6. s. 2 (b), to deprive the plaintiffs of their costs.

*Martin* obtained a rule *nisi*, to discharge the learned judge's certificate, upon the ground that, as the record stood, the battery by the defendants was admitted in the first and second pleas; and that as the stat. of 43 Eliz. c. 6, did not apply to an action for a battery, the certificate ought not to have been granted.

*Talfourd*, Serjt. and *Ball* shewed cause.—The case must be considered as it stood before the verdict was entered up for the plaintiffs, on the two first counts; and then, if the judge was satisfied that no battery was proved, he was justified in giving the certificate. The action is for an assault, battery, and false imprisonment, but it does not necessarily follow, that the plaintiffs proved all the causes of complaint which were mentioned in the declaration. *Wife v. Kincard* (c) was an action for assault, battery, and false imprisonment, and the judge having certified under the statute of Elizabeth, it was held, that the plaintiff ought to be deprived of his costs, although a battery was proved at the trial. And it is clear, that every imprisonment does not include a battery. *Emmett v. Lyne* (d), *Briggs v. Bowgin* (e). In *Bone v. Dawe* (f), the battery was admitted by the pleadings. But here, neither of the pleas admits the battery. It was not necessary for the plaintiffs to prove a battery under the first issue; proof of an assault or of an imprisonment, would have been sufficient to entitle them to a verdict; and the matter alleged in the second plea was a collateral fact which would have afforded an answer to the action, but it cannot be said, that the plea admits either of the charges in the declaration.

*Martin, contrà*.—There is an admission of the battery on the record. By the second plea, the defendants admit all the other material facts in the declaration, except that *Hester Wilson* was the plaintiff's wife. Thus, in *Jones v. Brown* (g), which was an action of trespass for taking the plaintiff's goods, the defendants pleaded that one A. became a bankrupt, and the issuing of a commission and the assignment of effects to the assignees was then stated, and it was averred, that the goods were the property of the assignees. The plaintiff replied, that the goods were not the goods of the assignees, but were the plaintiff's goods; and it was held, that the proceedings under the commission of bankruptcy were admitted by the replication, and that the only point in issue was the property in the goods. [*Tindal*, C. J.—There a particular

(b) Stat. 43 Eliz. c. 6, s. 2, "That if upon any action personal to be brought in any of her Majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court, shall not amount to the sum of 40s. or above; that in every such

case the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff, any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

(c) 2 New Rep. 471.

(d) 1 New Rep. 255.

(e) 2 Bing. 333.

(f) 3 Ado. & Ellis, 710; 1 Har. & Wol. 311.

(g) 1 Bing. N. C. 484; 1 Hodges, 33.

fact was singled out of several material averments. Here an issue is taken on a collateral fact.] The stat. 22 & 23 Car. 2, c. 9, provides, that in actions of assault and battery wherein the judge shall not certify that an assault and battery was proved, if the damages be under 40s. the plaintiff shall receive no more costs; but the construction upon this statute has always been, that if there were a plea upon the record which admitted the battery, the certificate of the judge was unnecessary, and the plaintiff was entitled to his costs. *Greene v. Jones* (h), *Smith v. Edge* (i); and the plea of not guilty may be resorted to, to shew that the battery is admitted. It has been held, that since the new rules, where a defendant pleads not guilty in trespass, *quare clausum fregit*, the plaintiff is entitled to full costs without a judge's certificate, although less than 40s. damages have been recovered. *Hughes v. Hughes* (k), *Smith v. Edwards* (l). Here upon the plea of not guilty and a general verdict found for the plaintiffs, it must be taken that the battery, as well as the assault and imprisonment, was proved at the trial. If it were not proved, there ought to have been an entry on the postea of not guilty as to the battery. *Bone v. Dave* (m) is a very strong authority for the plaintiffs. There, in trespass for assault, battery, and false imprisonment, there was an issue upon a new assignment to a plea of *son assault demesne*, and the jury having found a verdict for the plaintiff with one shilling damages, it was held, that the judge had no power to certify under the 43 Eliz. c. 6.

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Cur. adv. vult.

TINDAL, C. J.—The question in this case is, whether, notwithstanding the judge's certificate under the statute 43 Eliz., the plaintiff is entitled to his full costs, and this depends on another question, whether a battery appears to be confessed upon the record; for actions for battery being expressly excepted out of the statute, if it appears judicially to us that this was an action for battery, the statute does not apply. The plaintiff contends that such admission appears on the record, upon two grounds; first, because on the issue joined on the plea of not guilty, the postea has been entered up generally for him, and he insists that as he has declared for a battery, and there is no exception of it in the finding of the jury, it must be taken, as against the defendants, that a battery was proved at the trial. But to this the answer appears obvious, that the question as to the evidence, must be considered now as it was at the time the certificate was given, and at that time there had been no postea formally drawn up; and if the facts were such as that the judge had the power to certify at the moment the cause was decided, the defendants cannot be deprived of the benefit of such certificate, by the subsequent voluntary act of the plaintiff himself. The other ground on which the plaintiff relies is, that the second plea taking issue only on a single fact alleged in the declaration, must be taken to be an admission of the battery. But we think, taking the whole of the record together, there is no necessary confession of the battery on this record. The plea of not guilty expressly denies it; the last plea, which is a plea in confession and avoidance, excludes the battery. The question, therefore, arises on the second plea alone. Now, this is not in its form a plea of confes-

(h) 1 Will. Saund. 300 f.

(i) 6 T. Rep. 562.

(k) 2 Cr. Mee. & Ros. 663; 1 Gale, 302.

(l) 4 Dowl. P. C. 621; 1 Har. & Wol. 497.

(m) 3 Ado. & Ellis, 710; 1 H. & Wol. 311.

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sion and avoidance, it is a plea of traverse or denial of a particular collateral fact alleged in the declaration; and if this plea had been pleaded alone, although the plaintiff might contend that a cause of action was admitted by the defendant, yet he never could have contended that the whole of his ground of action was admitted, for his cause of action in this case, is several and divisible. This action is maintainable either for the assault, or the battery, or the imprisonment; either of those grounds of action would support it. The admission, therefore, of a ground of action that is divisible, we consider no necessary admission of the whole, but that the plaintiff must still prove at the trial what part of his gravamen he relies on. Holding, therefore, that there is no necessary admission of a battery on this record, we think the certificate of the judge, certifying under the statute of Elizabeth, deprived the plaintiff of full costs.

Rule discharged.

Nov. 7.

DAVIS v. CURTIS.

A prisoner was remanded at the suit of the plaintiff, under the compulsory clauses of the Lord's Act, 32 Geo. 2, c. 28, for not delivering a schedule of his effects. In the following term, and 60 days having elapsed, a rule was obtained to bring up the prisoner to give the schedule; and, at the same time, a rule nisi was granted on behalf of the prisoner, to discharge him in the action, under the 48 Geo. 3, c. 123, as having been a twelvemonth in execution. The Court ordered the prisoner to comply with the rule to give a schedule; but on his refusal to do so, it was held, that he was entitled to his discharge under the 48 Geo. 3, c. 123.

THE defendant had been brought up last *Trinity* Term, in an action at the suit of the plaintiff, under the compulsory clauses of the Lord's Act, 32 Geo. 2, c. 28, to deliver in a schedule of his effects, and was remanded. The 60 days allowed by sec. 17 of the stat. expired in *July*; and on the first day of this term, *Mansel* obtained a rule nisi, to bring up the prisoner to put in his schedule.

*Andrews*, Serjt., on the same day, moved that the prisoner might be discharged under the 48 Geo. 3, c. 123, he having been charged in execution by the plaintiff for more than 12 months, for a debt under 20*l.*; the twelvemonth expired in *August*; but a rule nisi only was granted as it appeared that the ten days' notice, required by Reg. Hil. T. 2 W. 4, I, sec. 90, had not been given. It was ordered that both rules should come on together. On a subsequent day, the prisoner having been brought up,

*Andrews* contended, that the prisoner was not "a prisoner in execution" within the terms of the statute, who could be required to give a schedule of his effects. He was clearly entitled to his discharge under 48 Geo. 3, c. 123 when the rule nisi for his discharge was obtained; and he only failed in obtaining his discharge, because he had not given the notice required by the rule of court. *Langdon v. Rossiter* (a) is precisely in point. There it was held, that a prisoner was entitled to be discharged, notwithstanding he had been previously brought up under the compulsory clauses of the Lord's Act and had been remanded, because he refused to deliver in a schedule of his effects. *Ex parte White* (b) is to the same effect. In *Evans v. James* (c), the Court refused to compel a prisoner to give a schedule, where it appeared that, since being remanded, he had filed his petition to be discharged in the Insolvent Court.

(a) M'Cle. 6. S. C. 13 Price, 186.  
 (b) 1 Dow. P. C. 66.

(c) 1 Dow. P. C. 260.

*Mansel, contra.*—The prisoner having been brought up in *Trinity Term*, and having neglected to deliver a schedule of his effects, he is now in default, and becomes liable to the penalty imposed by the statute. As it has since been determined, that he was not entitled to his discharge, for want of notice, the Court will now exercise its jurisdiction, and will not discharge him until he gives a schedule of his effects.

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Cur. adv. vult.

TINDAL, C. J.—We are of opinion that this case must be determined as it stood on the first day of the term; an application on behalf of the plaintiff, that the prisoner might be required to deliver his schedule, was first made. Afterwards a rule was applied for to discharge the prisoner under the 48 Geo. 3, c. 123; but, in point of fact, it was as if no rule at all had been granted, because due notice was not given. Therefore, on the principle *qui prior est tempore, potior est jure*, the plaintiff's rule for bringing up the prisoner must first be made absolute, and then the rule for the prisoner's discharge.

Nov. 9.

Rules absolute accordingly.

The prisoner was then asked if he was prepared to deliver in a schedule, but he said he was not prepared; whereupon, the Court said that he was entitled to his discharge under the rule obtained on his behalf.

## STANHOPE v. FIRMAN and EAVERY.

Nov. 21.

WILDE, Serjt., obtained a rule *nisi*, calling upon the plaintiff to shew cause why 75*l.* 5*s.* 6*d.*, the amount of a levy made by the sheriff of *Essex*, on the goods of *Eavery*, should not be paid over to *Eavery*. It appeared by the affidavits, that, in *September*, 1834, the defendant, *Firman*, had distrained the goods of the plaintiff for rent, and they were removed for safe custody to the house of the other defendant, *Eavery*, which was a public house; but *Eavery* was then absent, and did not, in any manner, interfere in making the distress. The goods were replevied at the instance of one *Clift*; and *Firman* employed *Wright*, as his attorney; who avowed for rent due from the plaintiff to *Firman*, and made cognizance in the name of *Eavery*, as the bailiff of *Firman*. The proceedings were subsequently removed out of the county court into this court, and a verdict was found for the plaintiff, and a subsequent application for a new trial was refused. *Eavery's* goods were subsequently taken in execution for the damages and costs in the action. *Eavery's* affidavit denied that he had ever received any notice that he was made a defendant in the action; or that he had received any notices or other documents, except a summons to appear at the county court; that he never directly or indirectly retained *Wright* or any other person, as his attorney; that he had been informed by *Stanhope*, the plaintiff, since his goods were taken in execution, that *Clift* had authorized him to replevy the goods, but not to make him, *Eavery*, a defendant.

Where it appeared that one of two joint defendants, had no notice that he was a party in an action, until the debt and costs were levied upon his goods, and that he had not employed the attorney who appeared for him; the Court, upon an application by the defendant to have the proceeds of the levy returned to him, referred the rule to the prothonotary, for the purpose of ascertaining whether the attorney was in insolvent circumstances and it being proved that he was, the rule was made absolute.

Turner shewed cause.—If the matters stated in the affidavits are true, the

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proper remedy by *Eavery* to obtain redress is, by suing *Wright*, the attorney, who appears to have been the chief actor in the proceedings. In *Anonymous* (a), *Holt*, C. J., said, "The course of this court is, where an attorney takes upon him to appear, the Court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him." In *Robson v. Eaton* (b), the same principle is to be found. And in *Anonymous* (c), where an attorney appeared and judgment was entered against his client, and he had no warrant of attorney, it is said by the court, "If the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but if the attorney be not responsible or suspicious, we will set aside the judgment; for otherwise the defendant has no remedy, and any one may be undone by that means." Here the defendant does not shew that the attorney is not responsible, and therefore, in accordance with this decision, he ought to be left to his remedy against the attorney, because the proceedings are all regular. In *Mudry v. Newman* (d), where proceedings had been taken without the knowledge of the plaintiff, and judgment as in case of a nonsuit was applied for, the Court said, the plaintiff's remedy was an action against the attorney; and in *Thomas v. Hewes* (e), an application to set aside a compromise alleged to have been made by the attorney for the defendant, on the ground that it was made without authority, was refused. So in *Filmer v. Delber* (f), and *Rex v. Addington* (g). And even where parties have complained in the course of a suit, that the attorney is acting without authority, the Court will not interfere, *Williams v. Smith* (h). Nor is it true that *Eavery* had no notice of the proceedings; because it is evident, that the receipt of the summons from the county court, must have given him notice that he was implicated in the transaction.

*Wilde, contrd.*—It has not been satisfactorily shewn, why *Eavery* was made a defendant. It is not proved that he was concerned in taking the goods, otherwise than by permitting them to be placed in his house, which was a public house, for safe custody. This case differs from those which have been cited, where attorneys in a cause, have entered into compromises or made arrangements; because when it is once satisfactorily shewn that the attorney was employed by the parties in a cause, the Courts will not interfere in a summary manner, but will leave the client to bring an action against the attorney. But here it is expressly shewn, that *Wright* was never the attorney of *Eavery*. There can be little doubt, but that there will be a total failure of justice, if *Eavery* be left to bring an action against *Wright*.

TINDAL, C. J.—We cannot come to a just decision in this case without ascertaining the circumstances of *Wright*, the attorney. The rule laid down in the case in *Salkeld* (i) is, that the Court will not interfere where the attorney is responsible. It appears that the plaintiff, by his own act, made *Eavery* a defendant, when, in fact, he was a mere bailee. The prothonotary must.

(a) 1 Salk. 86.

(b) 1 T. Rep. 62.

(c) 1 Salk. 88.

(d) 1 Cr. M. & R. 402.

(e) 2 Cr. & M. 519.

(f) 3 Taunt. 486.

(g) Sayer, 259.

(h) 1 Dow. P. C. 632.

(i) Anonymous, Salk. 88.

therefore, inquire whether or not *Wright* is in insolvent circumstances. In the mean time, the rule may be enlarged, and *Wright* may be served with a notice to appear.

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GASELEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule enlarged.

In *Hilary Term*, *Wilde*, Serjt., made the rule absolute, upon an affidavit of the service of the rule upon *Wright*, and which also shewed that he was in very needy circumstances, without means to take out his certificate, and that he described himself as being a ruined man.

Jan. 11.

### VIVIAN v. BLOMBERG.

THE following case was submitted by the Vice-Chancellor for the opinion of this Court. The vicarage of the parish and parish church of *St. Giles without Cripplegate*, is a benefice with cure of souls in the city of *London*; and the several messuages or tenements hereinafter particularly mentioned, (not being the capital messuage or dwelling-house used for the habitation of the vicar, nor having ground to the same belonging above the quantity of ten acres,) are parcels of the possessions of the said vicarage, and are situate within the said city, and have been accustomed to be demised by the vicars of the said parish, for the time being, for the term of 40 years, in possession, at the yearly rent of 3*l*. By indenture of lease, bearing date the 30th *October*, 1793, between the Rev. *George Watson Hand*, since deceased, then vicar of the parish church of *St. Giles without Cripplegate*, aforesaid, of the one part, and *Thomas Smith* and others of the other part, for the consideration therein expressed, the said *G. W. Hand* did demise, unto the said *Thomas Smith* and other persons, the messuages and other hereditaments hereinafter particularly mentioned, parcel of the vicarage of *St. Giles without Cripplegate*, as aforesaid; to hold from the 29th *September* then last past, for the term of 40 years; yielding and paying unto the said *G. W. Hand* and his successors, vicars for the time being of the said parish church, the yearly rent of 3*l*., payable quarterly, on the four most usual feasts; the lessees being charged with the reparations, and being subject to the covenants and agreements therein contained; and which said lease was duly confirmed by the patron and ordinary. The said *G. W. Hand* departed this life many years since, and, after his decease, the Rev. *William Holmes* was duly presented and instituted to and inducted into the vicarage of the parish and parish church of *St. Giles without Cripplegate* aforesaid. In *October*, 1830, there were less than three years unexpired of the said term of 40 years, and the said *William Holmes* duly executed another indenture of lease, bearing date the 8th *October*, 1830, and made between the said *William Holmes*, as such vicar, of the one part, and *James William Vivian* and *Christopher Hodgson* of the other part; whereby, for the considerations therein expressed, the said *William Holmes* did demise unto the said *J. W. Vivian* and

An ecclesiastical lease was made by a vicar, for 21 years from its date, of certain messuages in *London*, not used for the habitation of the vicar; at that time less than three years were unexpired of a former lease for 40 years, of the same premises. Held, that the lease was valid, and binding on the vicar's successor, being not within either of the restraining acts of *Elizabeth*, viz. 13 *Eliz.* c. 10, 14 *Eliz.* c. 11, and 18 *Eliz.* c. 11.



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*C. Hodgson*. All that message in *Fore Street*, in the parish of *St. Giles without Cripplegate*, London, called the *Quest-House*, and certain other messages in the said parish, as the same were particularly described in the plan drawn in the margin of the same indenture; to hold the same unto the said *J. W. Vivian* and *C. Hodgson*, their executors, administrators, and assigns, from the making of the said indenture, for the term of 21 years thence next ensuing, (subject, nevertheless, to the aforesaid existing lease of the same premises, bearing date the 30th of *October*, 1793, as therein before particularly mentioned;) yielding and paying therefore yearly, during the said term of 21 years, unto the said *W. Holmes* and his successors, vicars as aforesaid, the rent or sum of 3*l.*, payable quarterly, on the four most usual feasts, by equal portions, the first payment to be made on the feast day of the birth of our Lord Christ then next ensuing, the lessees being charged with the reparations, and subject to the covenants and agreements on the lessee's part therein contained, which last-mentioned lease was duly confirmed by the patron and ordinary. The said *W. Holmes* departed this life in the month of *June*, 1833.

The question for the opinion of the Court was, whether the said last-mentioned indenture of lease was a valid and effectual lease, and binding upon the successor of the said *W. Holmes*, in the said vicarage, for the remainder of the said term of 21 years, expressed to be thereby granted.

This case was argued in *Trinity Term*.

*Maule*.—If this lease be not affected by any statute, it would clearly have been good at common law. At common law, an ecclesiastical lease might have been made for any period. The only statutes applicable to this case, are 13 Eliz. c. 10, 14 Eliz. c. 11, and 18 Eliz. c. 11. It will scarcely be contended, that the stat. 13 Eliz. c. 10 (a), is applicable. This lease is for 21 years from the time of the making, and the accustomed yearly rent is reserved payable yearly. Then the stat. 14 Eliz. c. 11 (b), was to some extent as

(a) By 13 Eliz. c. 10, sec. 3rd, "And for that long and unreasonable leases made by colleges, deans, and chapters, parsons, vicars, and others having spiritual promotions, be the chiefest causes of the dilapidations and the decay of all spiritual livings, and hospitality, and the utter impoverishing of all successors incumbents, in the same; be it enacted, that from henceforth, all leases, gifts, grants, feoffments, conveyances, or estates, to be made, had, done, or suffered, by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate, (other than for the term of twenty-one years, or three lives from the time, as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable

yearly during the said term,) shall be utterly void, and of none effect, to all intents, constructions, and purposes; any law, custom, or usage to the contrary any ways notwithstanding.

(b) 14 Eliz. c. 11, reciting the stat. of the 13 Eliz. c. 10, enacts, "And whereas in one other act made in the said 13th year, intituled, an Act against fraudulent gifts, to the intent to defeat dilapidations of ecclesiastical livings, and for leases to be granted by collegiate churches, there is one branch to avoid certain leases to be made by masters and fellows of colleges, deans and chapters of cathedral or collegiate churches, masters or guardians of any hospital, or by any parson, vicar, or any other having any spiritual or ecclesiastical living; be it enacted, that the said branch, nor any thing therein contained, shall not extend to any grant, assurance, or lease of any houses belonging to any, the persons or bodies politick or corporate aforesaid; nor to any grounds to such houses appertaining, which houses be situate in any city, borough, town corporate, or market town, or the suburbs of any of them; but that all such houses and grounds may be granted, demised, and assured,

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enabling statute, and removed, upon certain conditions, the disabilities imposed by the 13th Eliz. c. 10. It will be contended, that this lease is void under the 19th section, as being a lease in reversion; but the answer is, that this was not a lease made by force of the last-mentioned statute, but was made at common law; or at all events, under the 13 Eliz. c. 10. The 18th Eliz. c. 11(c), is only applicable to cases where more than three years of the former lease remained unexpired; here there were only two years unexpired, and therefore this statute does not apply at all. By the recitals to the last-mentioned statutes, the enactments of the former statutes are referred to; and the three statutes have always been considered *in pari materid*. There is no direct authority upon the question now submitted to the Court; but in some of the older cases, the effect of these statutes has been considered. In the *Dean and Chapter of Westminster's* case (d), the question was whether an ecclesiastical lease of houses in *Westminster* was valid, it being made for forty years, to begin presently, although there were seventeen years in being, of a former lease which had been granted for ninety-nine years. In that case, *Tirrel, J.*, said, "I shall pass by how things were at common law amongst corporations; only I observe this, at common law, dean and chapter had an unlimited power over their possessions till the stat. 13 Eliz. c. 10. Now the reason of the stat. 13 of the queen was, because long and unreasonable leases made by ecclesiastical persons were the causes of dilapidation: then that enacts that leases made other than for the term of twenty-one years, or three lives from the making of such lease, shall be void. Then in the act of the 14th of the queen, c. 11, it is enacted, that the stat. of the 13 Eliz. shall not extend to leases made of houses in cities, boroughs, towns corporate, or market-towns, but that such houses may be demised, as they might have been before the making of that statute: provided always, that such house be not the capital or dwelling-house of the said ecclesiastical persons. Provided always, and be it enacted, that no lease shall be permitted to be made by force of this act in reversion, nor without reserving the accustomed rent, nor for longer term than forty years at the most. Then the stat. 18 Eliz. recites the 13th, and enacts that all leases made by ecclesiastical persons, whereof any former lease for years is in being, not to be expired,

*as by the laws of this realm, and the several statutes of the said colleges, cathedral churches and hospitals, they lawfully might have been before the making of the said statute, or lawfully might be if the said statute were not; so always that such house be not the capital or dwelling-house used for the habitation of the persons above said, nor have ground to the same belonging, above the quantity of ten acres, any thing in the said act to the contrary notwithstanding."*

By sec. 19, "Provided always, that no lease shall be permitted to be made by force of this act, in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparations, nor for longer term than 40 years at the most."

(c) By 18 Eliz. c. 11, after reciting the 13 Eliz. c. 10. By sec. 2, it is enacted "Sithence the making of which said estatute, divers of the said ecclesiastical and spiritual persons, and others having spiritual and eccle-

siastical livings, have from time to time made leases for the term of 21 years, or three lives, long before the expiration of the former years, contrary to the true meaning and intent of the said statute; be it therefore enacted, by this present parliament, that all leases hereafter to be made by any of the said ecclesiastical, spiritual, or collegiate persons, or others, of any their said ecclesiastical, spiritual, or collegiate lands, tenements, or hereditaments, whereof any former lease for years is in being, not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void, frustrate, and of none effect, any law, usage, or custom to the contrary notwithstanding."

(d) Carter, 9.

This case, as *Tindal, C. J.* observes in his judgment, is much more accurately reported in a collection of Reports of the Judgments of *Bridgman, C. J.*, by *Bannister*, published in 1823.

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surrendered, or ended, within three years next after the making of any such new lease, shall be void." And in the same case, *Bridgman*, C. J., said, "I do hold that this is a lease in reversion, and not warranted by *decimo quarto* of the queen. Now the statute of the 14th of the queen, prohibiting leases to be made in reversion, whether or not this be a concurrent lease, or a future interest this is all one. But I shall tell you wherein I differ from my brother, that hath held the same opinion with me. I do hold that if a lease be not made according to the proviso of the 14th, it falls back into the 13th, and if it be within the 13th, it falls under the 18th. The words in the statute of *decimo quarto* are not that no lease shall be permitted to be made, but no lease shall be permitted to be made by virtue of this act: so that this act leaves us where we were before; but if it be not within *decimo quarto*, we are not left at common law, but are within *decimo tertio*. My brother holds that all leases that are not within *decimo quarto*, are in *decimo octavo* of the queen. I think so; and this is the true reason of *Crane's case* (a). My brother holds, the proviso in *decimo quarto* makes the lease void, whereas it is no lease shall be permitted to be made by virtue of this act. These things in the first point are to be considered. It being in a corporation, and let for forty years, to begin presently, there being a lease in being for seventeen years. The 1st of *Elizabeth* comes not to our case. These acts then are the 13th, the 14th, and the 18th; so that if it comes out of compass of the 13th or 18th, then all rests on the 14th. Yet, by the way, it must be agreed that a concurrent lease is not prohibited by the statute of *decimo tertio*. The statute of *decimo quarto* was made for that very purpose, for else why should the 14th prohibit reversions. The 14th recites out of the 13th, and enacts that that branch shall not extend to houses within cities; and the words of the provisos are both qualifying clauses, and both have the same force. Let us observe the intent of the act. I differ from all in this. I think that this act of *decimo quarto* was not intended for the benefit of the church, but for the benefit of the tenants." According to the doctrine in this case, the present lease would be valid; and in *Baily v. Man* (b), where a lease was held void, because it began at a future day, *Hale*, C. J., also seems to have considered that such a lease as the present would have been good. He says, "Supposing two years of a former lease, a new lease to begin presently, is no lease in reversion, nor any lease void by 14 Eliz. c. 11." These are direct authorities to shew that this lease is not void. It might be further insisted, if it were necessary, that this is not a lease in reversion at all, within the 19th sec. of the 14 Eliz. c. 11, but a concurrent lease, and there are several authorities to warrant that construction.

*Stephen, Serjt., contrà.*—This is a lease in reversion, and is void by force of the proviso in the 19th section of the 14th Eliz. c. 11. The proviso declares, "that no lease shall be permitted to be made by force of this act, in reversion." The 13 Eliz. c. 10, does not affect the lease one way or the other; but if the 14th Eliz. c. 11, be read alone, the plain construction of it is, that this is a lease in reversion made under that statute. And this has always been the

(a) Hobart, 269.

(b) 3 Keble, 193, S. C. *Bayly v. Munda*, 2 Levinz, 61. S. C., *Bayly v. Murin*, 1 Ventris, 244.

way in which this question has been considered. *Bac. Abr.* tit. Leases, rule 3. *Hunt v. Singleton* (c), which is there cited, was a case of trespass, "and upon special verdict, it was found that the Dean and Chapter of *St. Paul's* made a lease for forty years of a house in *London*, to begin presently, there being then ten years of a former lease to a stranger to come; and the Court held this second lease merely void by 13 Eliz. c. 10, and not warranted by 14 Eliz. c. 11, which makes good leases of houses in market-towns for forty years, so they be not made in reversion; and this lease, though it be made to begin presently, yet, there being another lease *in esse*, is a lease in reversion for so much as remains of the former lease." And the majority of the judges in *Bailey v. Man* (d), and *The Dean and Chapter of Westminster's case* (e), laid down the same doctrine. The proviso in the 14 Eliz. c. 11, extends to all leases in reversion. There are two kinds of reversion: one where the habendum commences at a future day; another where the lease commences presently, but where there is another lease already in existence. That a concurrent lease is properly a lease in reversion appears in the cases which have been already cited. It has never been held that concurrent leases are good under the 14 Eliz. c. 11; and the reasoning in *For v. Collier* (f), where it was decided that concurrent leases, made under the 1st Eliz. c. 19, are good, does not apply. If the argument on the other side can be maintained, the proviso in the 14 Eliz. c. 11, will have no effect whatever, because it would be difficult to find what leases could be made by force of the act. In *Crane v. Taylor* (g), which was an action of covenant against certain ecclesiastical persons for not making a lease, it is said, concerning these statutes, "for though the 13 Eliz. c. 10, be general against all leases and grants other than for twenty-one years, and three lives of all the possessions of deans and chapters, yet there is a statute of 14 Eliz. c. 11, which is shuffled into an act of continuance of statutes, that enacts that that stat., 13 Eliz., shall not extend to any houses in cities or towns, &c., but that the same may be granted, demised, or assured, as they might lawfully have been before, and as if that statute had not been made; so that statute sets all loose touching such houses in cities, as against the stat. of 13 Eliz.; and, therefore, that statute of 14 Eliz. c. 11, makes a new law of itself for them, that no lease shall be made of them in reversion, which was not restrained by the 13 Eliz. as appears by the stat. of 18 Eliz., which provides for that mischief as not provided for before." But if it should be established that a concurrent lease might be made, then this is not a concurrent lease, but a lease in reversion, in the strictest sense. It is to take effect at the determination of the former lease. The only distinction between concurrent leases and leases in reversion, is the doctrine of estoppel between the lessor and lessee. *Wilson v. Sewell* (h), *Co. Lit.* 352 b.; *Rector of Chedington's case* (i). In this case there is nothing to estop the party, and in this view of the case, it clearly appears to be a lease in reversion, and not a concurrent lease. The 18 Eliz. c. 11, must be considered as qualifying the 14 Eliz. c. 11, as well as the 13 Eliz. c. 10, because, as it has been observed in several of the cases cited, all these statutes were made *in pari materid.*

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(c) Cr. Eliz. 564.

(d) 3 Keble, 193, S. C.; 2 Levinz, 61;  
1 Ventris, 244.

(e) Carter, 9.

(f) Moore, 107.

(g) Hobart, 269.

(h) 2 W. Black. 626.

(i) 1 Rep. 155 a.

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*Maule*, in reply.—It clearly appears upon the face of this lease, that this is not a lease in reversion, but a concurrent lease. The doctrine of estoppel has no application to the present case. The 14 Eliz. c. 11, must be read with reference to the 13 Eliz. c. 10; if the latter had not been in existence, then the 14th Eliz. would have been unnecessary. At all events, the effect of the nineteenth section of the 14th Eliz. is not to make a lease in reversion void. *Hunt v. Singleton* (k), and *Crane v. Taylor* (l), are both distinguishable from the present case.

Cur. adv. vult.

TINDAL, C. J.—As the question which has been sent for our consideration, by his honour the vice-chancellor, has been long considered as *resata questio* in the law; it may be more satisfactory that we should explain the grounds upon which our certificate in answer to that question is founded. The case states a lease by a vicar for twenty-one years from its date, made at the time when a former lease for forty years of the same premises was still in being, but was within three years of its expiration. The subject-matter of the lease consists of certain messuages in the city of London, of which the capital messuage or dwelling-house, used for the habitation of the vicar, forms no part, and the ground demised is of less extent than ten acres, so that the subject-matter of the demise clearly falls within the statute 14 Eliz. c. 11, s. 17; and the question is, whether such lease is void under any of the restraining acts of Eliz. There are three statutes, and three only, which it will be necessary to consider as bearing on the present question, viz., the 13 Eliz. c. 10, the 14 Eliz. c. 11, ss. 17 & 19, and the 18 Eliz. c. 11, s. 2, (m). Now the lease in question cannot be held to be made void, either by the first or last of the above-mentioned statutes. Not by the first, because it is a lease for twenty-one years only from the date, and complies with all the other requisites of that restraining act. It is, indeed, a lease in reversion; but there is nothing in that act to make leases in reversion void; and although the act lastly above named, the 18 Eliz. c. 11, s. 2, after pointing out the mischief of granting leases authorised by the former statutes in reversion, declares the same to be void; yet, in its terms, it only comprehends those leases in reversion which are made when the former lease for years is in being, not to be expired or ended within three years next after the making of any such new lease. But as the lease in question is made when the former lease for forty years was within two years of its expiration, by efflux of time, it is not a lease in reversion made void by the operative words of that statute. So far, therefore, as relates to the first or last of the statutes above referred to, this lease does not become void by either; that is, neither of those statutes seems to us to apply to the case. It only remains, therefore, to consider whether in the statute 14th of Eliz. c. 11, there is any enactment which avoids this lease; and, indeed, the argument on the part of the defendant has been put entirely on that statute, it being contended that the cases of leases of houses in cities, of the description therein contained, are taken entirely out of the first restraining statute, and are made subject to a new law created by the statute of the 14 Eliz.; and that, as the 19th section

(k) Cro. Eliz. 546.

(l) Hobart, 269.

(m) See these statutes, ante, page 255.

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enacts, that no lease shall be permitted to be made by force of this act in reversion, so the present lease, being a lease in reversion of houses described in the act, is void by the necessary construction of the statute. The first observation that arises on the stat. 14 Eliz. is, that it does not contain within it, from beginning to end, any terms importing the avoidance of any lease whatever; on the contrary, it is a statute which excepts from the operation of the former avoiding statute, leases of property therein described. It enacts, in sec. 17, that the branch of the former statute, nor any thing therein contained, shall extend to any houses, &c. (therein described), but that the same may be demised as by the laws of this realm, and the statutes of the colleges, &c., they lawfully might have been before the making of the said statute, or lawfully might if the said statute were not. No words can be more large and explicit to exempt such leases from the whole of the effect of the restraining stat. 13 Eliz.; and although the 19th sec. goes on to enact that no lease shall be permitted to be made by force of this act in reversion, there are no words added to declare leases, made contrary to such permission, void; and taking this stat. alone and by itself, it would be a much stronger construction than we feel ourselves warranted to put upon it, to hold that such words can defeat and avoid an estate, when they may be fully satisfied by allowing them to give a right of action to the successor. But, in truth, this stat. is not to be construed alone, but with reference to the stat. 13 Eliz., and the succeeding stat. 18 Eliz. c. 11; for not only are all the acts made in *pari materid*, but the 14th Eliz. c. 11, is expressly entitled An act for the continuation, explanation, perfecting, and enlarging of (amongst others) the former statute; and the 18th Eliz. c. 11, is entitled An act for the explanation of the statutes against defeating of dilapidations, &c. The three statutes, therefore, are to be read together, as forming one law on the same subject-matter, and it may, therefore, be well held that where leases of houses, &c., which are exempted out of the 13th Eliz. by the next stat. the 14th, do not observe the provisions of the latter statute, they fall within the general enactments of the 1st stat. and are made void thereby; in other words, a lease not warranted by the 14th Eliz. remains restrained by the 13th Eliz., which makes leases against that act void. But the lease in question, considered as a lease in reversion, is not, as is above stated, void by the 13th Eliz., and is expressly sanctioned by the 18th. No decided case has been brought before us, by the authority of which the present lease is to be declared void. In the case of *Bailey v Murin* (n), the lease was clearly void, under the stat. 13 Eliz., being a lease to begin at a future day, and not from the time of granting the lease; and, in that case, *Hale, C. J.*, appears to have thought the lease would have been good if it had been to commence presently, there being less than three years to come of the former lease. In *Hunt v. Singleton*, (Cro. Eliz. 564), the lease of a house for forty years, by the Dean and Chapter of *St. Paul's*, was held not warranted by the 14th Eliz., there being at the time of granting the lease ten years unexpired of the former lease. The case of *The Dean and Chapter of Westminster* (*Carter's Rep.* 9), decides that the lease in reversion of a house in the city of *Westminster* for forty years, by the Dean and Chapter of *Westminster*, was void, there being, at the time of granting the lease, seventeen years unexpired of the former lease; and in this latter case, the judgment of *C. J.*

(n) 1 *Vestris*, 244, S. C.; 3 *Keble*, 193; 2 *Levinz*, 61.

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*Bridgman* is strong, to shew that a lease, made under the circumstances of the present, would be held good. (See the judgment more at large in *Bridgman's* Judgments, 122, (o) ; ) and the case of *Crane v. Taylor*, Hob. Rep. 269, does not afford an authority that a lease for twenty-one years in reversion, there being only two years to come of the existing lease, would be void; it is an authority for no more than that a covenant to make a lease is not void under the stat. 18 Eliz., being made concerning a house in *London*. Upon the whole, therefore, we think this lease is not void, and send our certificate accordingly to the vice-chancellor.

The following certificate was sent :—" We have heard this case argued by counsel, and are of opinion that the lease therein mentioned, of the 8th of *October*, 1830, is a valid and effectual lease, and binding upon the successor of the said *William Holmes*, in the said vicarage, for the remainder of the said term of twenty-one years, expressed to be thereby granted.

" N. C. TINDAL,  
 " S. GASELNE,  
 " J. A. PARK,  
 " J. VAUGHAN."

(o) Reports of *Bridgman's* Judgments, by Bannister, published in 1823.

Nov. 14.

### YEATES v. CHAPMAN.

A copy of a writ of *capias* was served, without the requisite indorsement of the amount of the debt ; and, after a bail-bond was given, a summons was taken out to set aside the bail-bond for irregularity, and a judge made an order accordingly. *Held*, that the summons ought to have been to set aside the copy of the *capias* and subsequent proceedings ; and the judge's order was, consequently, discharged.

**ARCHBOLD** obtained a rule *nisi* to set aside two orders made by a judge at chambers, under the following circumstances:—On the 9th of *September*, a summons was taken out by the defendant, calling on the plaintiff to shew cause why the bail-bond should not be set aside for irregularity; but no judge being then in town, on the 20th of *September* another summons was obtained, calling on the plaintiff to shew cause why all the proceedings on the bail-bond, which had, in the mean time been assigned, should not be set aside for irregularity. The parties attended before a judge, upon this summons; and the irregularity complained of was, that the copy of the writ of *capias*, served upon the defendant when he was arrested, was not indorsed with the amount of the debt and costs, in pursuance of stat. 2 W. 4, c. 39, sec. 4; and it was also stated, by affidavit, that the assignment of the bail-bond had been taken by the plaintiff, after a promise made to the defendant to adjourn the hearing of the summons from the 8th, to the 20th of *September*. The learned judge thereupon made the two orders in question—one, that the bail-bond should be delivered up to be cancelled; the other, that the proceedings subsequently taken upon it, should be set aside.

It was objected, that the application ought to have been, to set aside the *capias*, and not the bail-bond, for irregularity.

*Ball* shewed cause, upon an affidavit, which satisfied the Court that the proceedings on the bail-bond had been taken, contrary to good faith. As to the other objection, by 2 W. 4, c. 39, sec. 4, the amount of the debt and costs ought to have been stated on the copy of the *capias*; and, inasmuch

as the copy was irregular, it was competent for the defendant to object that the bail-bond, which was founded upon the *capias*, was irregular also.

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*Archbold, contra*.—The plaintiff admits that the copy of the *capias* was irregular, for want of the indorsement; but the defendant ought to have applied at chambers to set aside the copy of the process, and not the bail-bond, for irregularity. By R. Mich. T. 3 W. 4, 10, it is ordered, "If the plaintiff, or his attorney, shall omit to insert in, or indorse on, any writ, or copy thereof, any of the matters required by the said act to be by him inserted therein, or indorsed thereon, such writ, or copy thereof, shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any judge." Here the writ was properly indorsed, and it was the copy which was irregular. In *Haskar v. Jarmaine* (a), where the writ was irregular, but the service was regular, and the defendant moved to set aside the service for irregularity, the Court discharged the rule, saying, "You might have moved to set aside the writ and the service. We cannot say that the proceedings are more irregular than you state them to be." *Smith v. Clarke* (b).

TINDAL, C. J.—This is a motion, made by the plaintiff, to set aside two orders, which have been made at chambers; and the question is, whether the rule shall be made absolute as to both or either of them. As to the order, that the proceedings on the bail-bond should be set aside, the rule must be discharged, with costs, because the proceedings were taken in breach of an engagement to suspend them.

As to the other point, it appears that the summons was taken out to set aside the bail-bond for irregularity; but there was no irregularity in the bail-bond itself; the only objection was, that there was no indorsement on the copy of the writ of *capias*, which made it irregular, and not void, according to the rule Mich. T. 3 W. 4, 10. The proper summons would have been, to set aside the copy of the writ of *capias* and the subsequent proceedings. The rule to set aside that order must, therefore, be made absolute, the defendant being allowed six days to put in bail to the action.

GASELEE, J., concurred.

VAUGHAN, J.—The proper proceeding would have been to apply to set aside the copy of the writ and the subsequent proceedings.

BOSANQUET, J.—The only doubt I felt was, whether, as there had been no service of a true copy of the *capias*, the bail-bond was not void; just as if a bail-bond is given upon an insufficient affidavit to hold to bail. But the rule of court expressly says, that the omission only makes the process irregular, but not void; and, as this copy has not been set aside for irregularity, it stands good.

Rule accordingly.

(a) 1 Cr. & J. 408.

(b) 2 Dow. P. C. 218.



Nov. 15.

## BROOKES v. FARLAR.

A defendant is not entitled to a particular of demand, on a count on a bill of exchange.

IN debt, by the drawee of a bill of exchange against the drawer, the declaration contained a count on the bill, with counts for money paid, and on an account stated; and the plaintiff delivered particulars of demand, by which it appeared that he claimed 94*l.*, "being part of the consideration on the bill of exchange." The plaintiff afterwards amended the declaration by striking out the two last counts, and the defendant applied without success to a judge at chambers for further particulars.

*Bompas*, Serjt., obtained a rule *nisi* for further particulars, upon an affidavit which stated that a tender had been made of a larger sum than was due on the bill of exchange; and that the plaintiff had neglected to deliver any invoices with the goods, in payment of which the bill had been given.

*Stephen*, Serjt., shewed cause, on an affidavit which contradicted the statements made by the defendant, and cited *Cooper v. Amos* (a), and *Snelling v. Chennels* (b).

*Bompas*, Serjt., contended that it was apparent the plaintiff was suing upon the consideration for which the bill had been given, and not on the bill itself; and that in such a case the defendant was entitled to have a particular of the demand, to enable him to make a tender, or to pay money into Court.

TINDAL, C. J.—This rule would not have been granted, if we had known the state of the record. Where the plaintiff declares only on a count for a bill of exchange, it is only on very strong grounds that the defendant is entitled to a bill of particulars at all. Here it appears that the defendant knows, within one or two pounds, what the plaintiff's demand is. This is certainly a case in which we cannot interfere.

GASELEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule discharged, with costs.

(a) 2 Car. & P. 267.

(b) 5 Dow. P. C. 80.

Nov. 21.

## LAMONT Vouchee.

The warrant of attorney in a recovery cannot be amended, even to the extent of transposing the names of the vouchee.

SCRIVEN, Serjt., moved to amend a recovery. The vouchee's name was Robert William Alexander Lamont; but he was named, in all the proceedings, as William Robert Alexander Lamont, by which name he had executed the warrant of attorney, and the deed to lead the uses of the recovery. [Tindal, C. J.—As he has executed the deed in the name by which he is described, would he not be estopped thereby?] The purchaser will not be

satisfied unless the names are transposed according to the fact; and as the vouchee lives in the *West Indies*, great delay will be avoided if the amendment is allowed.

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TINDAL, C. J.—The vouchee is not dead, and you can easily take proceedings under the new statute. The difficulty is as to the amendment of the warrant of attorney. There are cases which shew that the Court will not meddle with that (a). If you can find any authority to support your application, you may mention the matter again.

GASELEE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

(a) See *Addis*, dem. *Power*, vouchee, 7 Bing. 455.

### GALE v. WINKES.

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ARCHBOLD obtained a rule *nisi* to set aside a judge's order for a distringas, and also the distringas which had been issued, for irregularity. It appeared that the distringas had been granted by a judge at chambers, upon an affidavit that, on the 13th of *October*, the plaintiff's attorney went to the defendant's house to serve a copy of the writ of summons, but the defendant was not at home; that he thereupon left a note with a female at the house, thereby informing the defendant of the purport of the visit, and that if he did not call on the plaintiff's attorneys before two o'clock on the following *Saturday*, the writer would call again on the evening of that day, at nine o'clock; that the defendant, not having called at the time appointed, another application was made at his house on the *Saturday* evening, at nine o'clock, when the female stated that she had delivered the note to the defendant, but that he was not then at home, nor had he left any message. A copy of the writ of summons was then left. Two objections were made: first, that the learned judge ought not to have granted the distringas until three calls and two appointments had been made: secondly, that the writ of distringas under which the sheriff had levied on the defendant's goods, was not indorsed with the amount of the debt and costs, in pursuance of R. Hil. T. 2 Wm. 4, II., and R. Mich. T. 3, Wm. 4, V., and was therefore irregular.

Where a judge at chambers had ordered a distringas to issue upon an affidavit, which shewed but two calls and one appointment to serve the summons, the Court refused to set it aside, after it was executed; the defendant not having sworn that he did not receive notice of the appointment.

A writ of distringas, not indorsed with the amount of the debt and costs, is irregular.

Wilde, Serjt., shewed cause.—By 2 Wm. 4, c. 39, sec. 2, if it shall be made appear by affidavit, "to the satisfaction of a judge," that a defendant cannot be compelled to appear without some more efficacious process, then the judge may order a distringas to issue; and although it has been usual to require that three calls and two appointments should be made, there is nothing to prevent a judge from exercising his discretion upon that subject. The defendant does not now swear that he did not receive the note, or the copy of the writ of summons. It is not necessary to make three calls, if it can be made manifest to the Court that the defendant is keeping out of the way (a).

[Tindal, C. J.—Or suppose the party were seen to take his goods away, to

(a) See the cases collected, *Tidd's New Practice*, 76, note c.

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avoid the levy under the distringas?] In all such cases, the Court or a judge will exercise their discretion. The facts of this case afforded *prima facie* evidence that the defendant was keeping out of the way. Secondly, the rules which have been referred to, only apply to cases where the writ of distringas is the original process. Here the defendant had notice of the amount of the debt and costs, on the copy of the writ of summons.

Archbold, contra.—The learned judge would not have granted this distringas, if some imposition had not been practised upon him at chambers. [*Bosanquet, J.*—The judges read the affidavits. *Tindal, C. J.*—Suppose the order had been inadvertently made, should you not shew that you did not receive notice of the appointment?] At all events, the indorsement was necessary on the back of the distringas.

TINDAL, C. J.—This rule must be made absolute, so far as it relates to the writ of distringas, on the ground that no indorsement was made of the amount of the debt and costs. As to the other part of the rule, I am not satisfied we ought to set aside the judge's order. The statute has left the power of granting the writ of distringas to the discretion of the Court or of a judge. I am far from saying, that it is not usual to require three calls and two appointments, and perhaps I should not have granted this application. But the question is, whether *rebus sic stantibus*, there might not have been sufficient to satisfy the learned judge that the distringas ought to issue; and the defendant, not having now denied that he did receive the letter which was addressed to him, and the copy of the writ of summons, I think we may refuse to grant the former part of this application, without breaking into the established rule of practice.

GASELEE, J.—I am of the same opinion; it is said to be a positive rule of practice, not to grant the distringas without three calls and two appointments, but that is not so. The defendant does not state that he did not receive the letter, and I think the learned judge was justified in granting the distringas.

VAUGHAN, J.—I am of the same opinion. It is entirely in the discretion of the Court or a judge whether a distringas shall issue. The practice is, no doubt, as it has been stated; but it is not an imperative rule to require three calls and two appointments.

BOSANQUET, J.—The Courts have required, as a general rule, that three calls and two appointments shall be made, but their discretion is not confined in that respect. There were circumstances in this case from which the learned judge might have considered it necessary to order the distringas, and he having exercised his discretion, I am of opinion that we ought not to interfere.

Rule absolute to set aside the distringas; refused as to the other part.

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ACTION on the case. The first count of the declaration stated, that the plaintiffs were lawfully possessed of a certain vault or cellar, situate in the city of *London*, and used and occupied the same in and for the purpose of carrying on their trade or business of wine merchants, and that the plaintiffs kept and had in their said vault or cellar, divers large quantities of wine, to wit, 30,000 bottles of wine; and divers, to wit, 30,000 bottles of the plaintiffs, of great value, to wit, of the value of 2,000*l.*; that before and at the times of the committing of the grievances by the defendant, as hereinafter next-mentioned, the plaintiffs' said vault or cellar adjoined certain other vaults, and certain walls there, and in part rested upon and was of right in part supported by part of the said adjoining vaults and of the said walls, and the plaintiffs, before and at and during those times, were of right entitled that their said vault or cellar should be so supported in part by the said parts of the said adjoining vaults and walls, without the hindrance or disturbance of any person. That before and at the times of the committing the grievances hereinafter mentioned, there were certain foundations belonging to and supporting the said vault or cellar of the plaintiffs, and that they, of right, had enjoyed, and still of right ought to enjoy, such foundations, and the benefit and advantage thereof for the support of their said vault or cellar, without the hindrance or disturbance of any person; yet, the defendant, well knowing the premises, but contriving and intending to injure the plaintiffs, heretofore, to wit, on the 1st *October*, 1835, and on divers other days and times afterwards and before the commencement of this suit, wrongfully and injuriously took down, pulled down and removed, and caused and procured to be taken down and removed, the said vaults and walls so adjoining the said vault or cellar of the plaintiffs, by which the said last-mentioned vault or cellar, was so in part supported, as aforesaid, without shoring up, propping up, or otherwise securing or taking other reasonable and proper precautions, to support, or secure, or shore up the said vault or cellar of the plaintiffs, so as to prevent the same from giving way, or being weakened, or damaged, or destroyed on that occasion; and also, then and there wrongfully and injuriously dug, and made, and caused,

1. In case the plaintiff declared that he was possessed of a vault, which adjoined other vaults, and that he was of right entitled that his vault should be supported by the adjoining vaults, and that he of right enjoyed certain foundations for the support of his vault; but that the defendant wrongfully and injuriously pulled down the adjoining vaults, without shoring up the plaintiff's vault; and also, made excavations and disturbed the foundations, without taking due and proper precautions to prevent the foundations from being weakened. *Held*, after pleading over, that the count contained a clear and substantial ground of action, viz.—that of negligence and carelessness in the exercise of the

defendant's rights; and that, if the defendant meant to object, that the plaintiff's title was not alleged with sufficient certainty, he ought to have demurred specially.

2. A second count alleged, that the plaintiff was possessed of a vault, and that the defendant was about to remove other vaults next adjoining to it, and that it was the duty of the defendant, to give notice of such his intention; and also, to use due care and skill, and take reasonable precautions in pulling down the vault; and that the defendant wrongfully and injuriously pulled down the vault without giving notice, and that he did not use due care and skill, or take reasonable precautions, but that he pulled down the vault in a careless, unskillful, and improper manner, by reason whereof, the vault of the plaintiff was weakened. *Held*, that the allegation of want of care and skill, shewed a breach of duty which was imposed by law, and that the declaration shewed a good ground of action.

Whether the obligation to give notice to the plaintiff, resulted as an inference of law, from the mere juxta position of the walls.—*Quere*.

3. A plea to the first count, that the defendant was not bound, by law or otherwise, to shore up the plaintiff's vault, is bad; first, because it traverses that which is only the description of the means by which the injury was sustained; and secondly, because it raised an issue in law.

4. Where the defendant is the proximate cause of damage, it is no answer to say, that the falling of certain timber, which was the immediate cause of the damage, was not occasioned by any act or neglect of the defendant, or by the breach of any duty cast upon him by law.

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and procured to be dug and made, divers excavations in the earth, near to the said foundations of the said vault or cellar of the plaintiffs, and loosened, weakened, and disturbed such foundations, without taking due and proper precautions to prevent the said foundations from being weakened, and injured, and giving way; and by reason thereof, the said foundations then became and were injured, loosened, and weakened; and the said vault or cellar of the plaintiffs, became and was greatly injured and weakened; and by reason of the said several premises, and also by reason of certain timber, wood, bricks, and mortar, and other things afterwards, to wit, on &c. falling upon the said vault or cellar of the plaintiffs, (and which vault or cellar, by reason of the same having been so weakened and injured as aforesaid, and on no other account, was then unable to bear or resist the force, weight, and pressure of the said timber, wood, bricks, and mortar, and other things as the same otherwise might and would have done,) the same vault or cellar of the plaintiffs then, to wit, on &c. gave way and fell in, and became and was greatly injured and destroyed, and by reason of the several premises, a great part, to wit, one-half of the said wine became wasted, lost, spoiled, and destroyed, and the residue thereof became, and was, and still is injured, and deteriorated in value, and the said bottles were damaged and destroyed; and thereby also the plaintiffs, from thence hitherto, lost and became deprived of the use of their said vault or cellar, and of the profits, benefits, and advantages which they otherwise might and would have acquired from the possession and use thereof; and the same became of no use or value to the plaintiffs; and thereby the plaintiffs were greatly prejudiced and injured in their said trade and business, and necessarily incurred divers expenses, to wit, to the amount of 2000*l.* in having their said vault or cellar examined and surveyed, and the nature and extent of the said damages, injuries, and losses ascertained and repaired, and in and about the removal of the ruins of the said vault or cellar, and of such of the said wines as were not wholly lost and destroyed, and in and about the removal of the said wine, and said bottles, and pieces thereof, and the procuring the said vault or cellar and the ruins thereof, and the said wine and bottles to be watched and taken care of during the times aforesaid, and otherwise in relation to the several premises and matters last aforesaid, and were otherwise injured.

Second count.—That before and at the times of committing the grievances hereinafter mentioned, the plaintiffs were possessed of a certain other vault, situate in *London* aforesaid, and used and occupied the same in and for the purposes of carrying on their said trade and business of wine merchants, and kept and had in their said vault, divers large quantities of wine, to wit, &c., and bottles of the plaintiffs of great value, to wit, of the value of 2000*l.* That at the time of the committing of the grievances hereinafter mentioned, the defendant was about to pull down, and prostrate, and remove, and did pull down and prostrate certain other vaults, and buildings, and walls, next adjoining the last-mentioned vault of the plaintiffs, and thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' last-mentioned vault in that behalf, to give due and reasonable notice to the plaintiffs of his, the defendant's, intention, to pull down, prostrate, and remove the said vaults, buildings, and walls, so adjoining the plaintiffs' last-mentioned vault, before the defendant prostrated and removed the same, so as to enable the plaintiffs to protect themselves in that behalf; and also, to use

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due care and skill, and take due, reasonable, and proper precautions, in and about the pulling down, and prostrating, and removing the said vaults, buildings, and walls, so adjoining the plaintiffs' last-mentioned vault, so that, for want of such care, skill, and precaution, the last-mentioned vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed on that occasion, or the plaintiffs injured in respect thereof: yet, the defendant, not regarding his duty in that behalf, but contriving and intending to injure the plaintiffs heretofore, to wit, on &c., and on divers other days and times, afterwards and before the commencement of this suit, wrongfully and injuriously pulled down, prostrated, and destroyed the said vaults, buildings, and walls, so adjoining the last-mentioned vault of the plaintiffs, without giving the plaintiffs, or either of them, due or reasonable or other notice of his, the defendant's intention so to do, according to his said duty in that behalf, although the defendant did not shore up or protect the plaintiffs' said last-mentioned vault; and the defendant did not nor would use due care or skill, or take due, reasonable, or proper precautions, in or about the pulling down, or prostrating, or removing the said vaults, buildings, and walls, so adjoining the last-mentioned vault of the plaintiffs, upon the said last-mentioned occasion, according to his said duty; and the defendant contriving and intending to injure the plaintiffs heretofore, to wit, on, &c., and on the said other days and times after that day and before the commencement of this suit, wrongfully and injuriously pulled down and prostrated divers parts of the said vaults, buildings, and walls, so adjoining the said last-mentioned vault of the plaintiffs, upon the last-mentioned occasion, in a careless, unskilful, and improper manner, and behaved and conducted himself carelessly, unskilfully, and improperly in that behalf; and by reason of the several premises in this count mentioned, the last-mentioned vault of the plaintiffs, became and was greatly shaken, and weakened, and injured; and by reason of the several premises in this count before-mentioned, and also by reason of certain timber, wood, bricks, and mortar, and other things, afterwards, to wit, on, &c., falling upon the said last-mentioned vault of the plaintiffs, (and which vault, by reason of the same having been so shaken, weakened, and injured as aforesaid, and on no other account, was then unable to bear or resist the force, weight, and pressure of the last-mentioned timber, wood, bricks, and mortar, and other things, as the same otherwise might and would have done,) the last-mentioned vault of the plaintiffs then, to wit, on &c. was greatly injured and damaged, &c.

Pleas.—Fourth; as to so much of the first count as related to the defendant not shoring up, propping up, or otherwise securing or taking other reasonable or proper precautions, to support, or secure, or shore up the said vault or cellar of the plaintiffs in that count mentioned, so as to prevent the same from being weakened, or damaged, or destroyed on the occasion, in the said first count mentioned; that the defendant was not, on the occasion, in that count mentioned, or otherwise, bound by law or otherwise, nor was there any duty, obligation, or liability, imposed or cast by law or otherwise upon him, to shore up, prop up, or otherwise secure, or to take other reasonable, or proper, or any means to support, or secure, or shore up the said vault or cellar of the plaintiffs, for the purposes in that count mentioned or otherwise, and that the defendant was ready to verify.

Fifth;—And as to so much of the said first count, as related to the defendant not having taken due and proper precaution, to prevent the said foundations of

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the said cellar of the plaintiffs from being weakened, injured, and giving way, as in that count mentioned, that the defendant was not on the occasion in that count mentioned, or otherwise, bound by law or otherwise, nor was there then any duty, obligation, or liability, cast or imposed by law or otherwise upon him, the defendant, to take due and proper or any precautions, to prevent the said foundations of the said vault or cellar of the plaintiffs, in that count mentioned, from being weakened and injured, and that the defendant was ready to verify.

Sixth;—As to so much of the said first count, as related to the falling of the said timber, wood, bricks, and mortar, and other things, upon the said vault or cellar; that the said falling of the said timber, &c. was not, nor was the falling of any of them, or any part of them, caused or occasioned by any act, default, neglect, or omission of the defendant, or the breach or neglect of any duty, obligation, or liability, imposed or cast upon him by law or otherwise, and that he was ready to verify.

Seventh;—That the defendant had good, lawful, and sufficient right, title, power, and authority, to pull down, prostrate, and remove the said vaults and walls in the said first count mentioned, and upon part of which, the vault of the plaintiffs was in and by that count alleged to have rested and been supported, and that the digging and making the said excavations in the earth, in that count mentioned, were necessary and proper works for that purpose; and that, if the said foundations of the said vault or cellar, in that count mentioned, were loosened, weakened, or disturbed, they were so loosened, weakened, and disturbed, by and by reason of such necessary and proper works as aforesaid, for the purpose aforesaid; and further, that the plaintiffs, before any damage or injury was or could be done, or caused to be done to them, or their said vault, or the contents thereof, and in sufficient time to guard and protect themselves and their said vault or cellar and its contents, against the consequences of the defendant's pulling down, prostrating, and removing the said vaults, and the necessary and proper works for that purpose, had notice of his intention, to pull down, prostrate, and remove the said vaults and walls; and if they were minded and desirous to protect themselves or their property in the premises, against the consequences of the defendant's so pulling down the said vaults and walls, it was their duty to have properly shored up and supported their vault or cellar, or to take due and proper precautions to protect themselves and their said vault or cellar and the property therein, against the consequences of the exercise by the defendant, of the said lawful right of the defendant, to pull down, prostrate, and remove the said vaults and walls, on which the vault of the plaintiffs, in that count mentioned, was alleged in part to have rested and to have been supported; and had they done their duty in that behalf, their said vault or cellar and its contents would have been saved and protected from the alleged damages and injuries in the first count mentioned, but they wholly neglected and omitted so to do: and the defendant further saith, that in pulling down, prostrating, and removing the said vaults and walls, he was not guilty of any unlawful or wrongful act, neglect, default, or breach of any duty, imposed upon him by law or otherwise, but exercised his said lawful right in the manner he had lawful right to exercise the same, and not otherwise; and if any injury or damage happened, or was occasioned to the plaintiffs or their said vault, or the contents thereof, the same happened and was occasioned by the default of the plaintiffs themselves.

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in not properly shoring up and supporting their said vault, and taking due and proper precautions to protect themselves and their said vault or cellar and its contents, from the consequences of the exercise, by the defendant, of his said lawful right to pull down, prostrate, and remove, and in pulling down, prostrating, and removing the said vaults and walls, and not by and through any unlawful or wrongful act of the defendant, or any default or omission of the defendant, of any duty or obligation imposed on him by law or otherwise, in the pulling down, prostrating, and removing the vaults and walls, and that he was ready to verify.

Eighth.—As to so much of the last count as related to the defendant not having given the plaintiffs due and reasonable notice of his intention to pull down, prostrate, and remove the said vaults, buildings, and walls, in that count mentioned; that the defendant was not bound by law or otherwise, nor was there any duty, obligation, or liability, imposed or cast on him by law or otherwise, to shore up or protect the said last-mentioned vaults of the plaintiffs on the occasion, in that count mentioned or otherwise; nor was it his duty, in the event of not shoring up or protecting the said last-mentioned vault of the plaintiffs, to give due or reasonable or any notice of his, the defendant's, intention, to pull down, prostrate, and remove the said vaults, buildings, and walls, adjoining the vault of the plaintiffs, in that count mentioned, in manner and form as the plaintiffs had in that count alleged; conclusion to the country.

Eleventh.—As to so much of the said last count, as charged it to have been the duty of the defendant, to have taken due and reasonable precautions in and about the pulling down, and prostrating, and removing the said vaults, walls, and buildings, in that count mentioned; so that, the said last mentioned vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed, or the plaintiffs injured in respect thereof; that it was not his duty to have used due and proper or any precautions in that behalf, as the plaintiffs had in that count alleged; conclusion to the country.

Twelfth.—As to so much of the said last count as related to the falling of the said timber, wood, bricks, and mortar, and other things, upon the said vault of the plaintiffs; that the said falling of the said timber, wood, bricks, and mortar, and other things, upon the said vault of the plaintiffs, in that count mentioned, was not, nor was the falling of any of them or any part of them, caused or occasioned by any act, default, omission, or neglect of the defendant, or the breach or neglect of any duty, obligation, or liability, imposed or cast upon him, by law or otherwise, and that the defendant was ready to verify.

Thirteenth.—And, as to the said last count of the declaration, that he, the defendant, had good, and lawful, and sufficient right, title, power, and authority, to pull down, prostrate, and remove the said vaults and buildings, in the said last count mentioned, and therein stated to have been pulled down, prostrated, and removed by him; and that the plaintiffs had notice of his intention so to do, before any damage or injury was or could be done, or caused to be done to their said vault or cellar and the contents thereof, or any part of such contents, in sufficient time to have enabled them to guard and protect themselves against the consequences thereof, if they had been minded or desirous so to do; and, if they had been so minded or desirous, it was their duty to have shored up and supported their said vault in that count mentioned, or to have taken other due and proper precautions to have protected themselves and

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their said last-mentioned vault and its contents, against the consequences of the exercise, by the defendant, of his said right and authority to pull down, prostrate, and remove, and in and about the pulling down, prostrating, and removing the said vault, walls, and buildings, in that count mentioned; and had they done their duty in that behalf, their said last-mentioned vault and its contents would have been saved and protected from the alleged damage and injuries in the last count mentioned, but they wholly neglected and omitted so to do. And the defendant further said, that in pulling down, prostrating, and removing the vaults, walls, and cellars, in that count mentioned, he was not guilty of any unlawful or wrongful act, or neglect, or default of any duty imposed on him, by law or otherwise, but exercised his said right and authority, in the manner he had right and authority to exercise the same; and if any damage or injury happened, or was occasioned to the plaintiffs or their said vault or its contents, in that count mentioned, the same happened and was occasioned by the default of the plaintiffs themselves, in not properly shoring up or supporting their said last-mentioned vault, or taking due and proper precautions to protect themselves and their last-mentioned vault and its contents against the consequences of the exercise by the defendant, of his said right and authority, to pull down, prostrate, and remove, and in and about the pulling down, prostrating, and removing, the vaults, walls, and buildings, in that count mentioned; and not by or through any unlawful or wrongful act of the defendant, or any neglect or omission of the defendant, of any duty or obligation imposed upon him by law or otherwise, in and about the pulling down, prostrating, and removing the said vaults, buildings, and walls, in the said last count mentioned; conclusion with a verification.

Special demurrer—the causes assigned appear in the arguments.

Joinder in demurrer to the foregoing pleas.

R. V. Richards, in support of the demurrer.—First, the declaration is sufficient. The plaintiffs are entitled to declare on their possession of the vault; *Dodd v. Holme* (a), *Jones v. Bird* (b), *Brown v. Windsor* (c). It is true that the mere act of digging near the plaintiffs' vault, may not of itself be actionable; *Wyatt v. Harrison* (d); but here the declaration alleges that the act was done wrongfully; and in the last-mentioned case, as well as in *Peyton v. The Mayor of London* (e), it was not alleged that the plaintiff had a right to have his house supported by the adjoining house. The declaration discloses a sufficient liability by the defendant to support the vault; and it will depend upon the evidence, at the trial, whether the plaintiffs are entitled to damages. Secondly, the pleas are insufficient. The first count of the declaration states that the plaintiffs' vault in part rested upon the walls of the defendant; and that the plaintiffs were of right entitled that their vault should be so supported. The subsequent statement, that the defendants removed the adjoining walls without shoring up or securing the plaintiffs' vault, is a mere statement of the manner in which the injury was sustained. Therefore, the fourth plea, which denies that the defendant was bound by law, to shore up and secure the vault, traverses an immaterial allegation in the declaration. The plaintiffs rest their cause of action upon their right to have their vault supported, and that is not answered in any part of the plea.

(a) 1 Ado. & Ellis, 493.

(b) 5 B. & Ald. 837.

(c) 2 Cr. & J. 20.

(d) 3 B. & Adol. 871.

(e) 9 B. & Cress. 725.

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This plea is also bad, because it offers an issue in law for the consideration of the jury. Exactly the same observations are applicable to the *fifth* plea. In the *sixth* plea, the defendant pleads, as to the falling of the timber upon the cellar, that it was not occasioned by any neglect, by the defendant, of any duty cast upon him by law; but this is also pleading matter of law; nor does this plea confess and avoid or traverse any part of the declaration, and if it was intended as a traverse, it ought to conclude to the country. It also denies a legal obligation, which is not alleged in the declaration. The *seventh* plea is to the whole of the first count of the declaration. It states that if the foundations of the vault were loosened, it happened by the necessary works, which the defendant had power to execute. But that is a qualified and hypothetical confession, which vitiates the plea. *Gould v. Lasbury* (*f*). Another objection to this plea is, that it leaves unanswered the wrongful act of the defendant in digging the earth and disturbing the foundation of the cellar, which is alleged in the declaration. The other pleas are cast in the same mould, and are open to the same objections, as the pleas which have been already noticed.

Wightman, (with whom was *Hoggins*.) *contrà*.—The plea of not guilty would not be sufficient to enable the defendant to answer this action; and in framing the special pleas, in consequence of the peculiar mode in which the declaration is framed, it is difficult for the defendant to know how far he is charged as being liable for his own acts, and how far for the acts of third persons. In *Flower v. Adam* (*g*), it is said, "If the proximate cause of damage be the plaintiff's unskilfulness, although the primary cause be the misfeasance of the defendant, he cannot recover; at least, if the mischief be in part occasioned by the misfeasance of a third person not sued." Here the proximate cause of the injury does not appear to be the act of the defendant, because the declaration is so framed that it does not appear that the falling of the wood was caused by any act of the defendant. The declaration is, therefore, defective. Another objection is, that the plaintiffs do not disclose any right to have their cellar supported by the walls of the defendant's vault. The right may have arisen by reason of the walls being ancient, or by twenty years' use, or by the license of the defendant. If it existed by reason of a license, it is possible that the statement in the fourth plea would be a complete answer to the action. The plaintiffs do not shew any right to have their vault supported and propped up, as alleged in the declaration; and the defendant may say, "I admit you have a right to have the support of my wall; but I deny that I am under any liability to support it, if I desire to remove my wall." The plaintiffs ought to have shewn how the liability arose, which required the defendant to take care that the plaintiffs' wall did not fall down. The declaration is therefore bad; or, if not, then the pleas are good. The *sixth* plea is not pleaded as an answer to the action, but only to so much of the declaration as charges the injury by the falling of the timber. That may be the wrongful act of a third person; and, therefore, the defendant is entitled to put this answer on the record. The *seventh* plea is sufficient; because the plaintiffs do not shew any right in the declaration to require the defendants to shore up the premises. The substance of it is, that the mischief was caused by the

(*f*) 1 Cr. M. & Ros. 254.

(*g*) 2 Taunt. 314.

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carelessness of the plaintiffs. The allegations in this plea would exactly meet the case of a qualified license given to the plaintiffs, to enjoy the support of the defendants' wall; and the plaintiffs shew no title in derogation of that stated by the defendant: and as this plea alleges that the plaintiffs had notice of the pulling down of the wall, the case is stronger than *Peyton v. The Mayor of London* (h). The plaintiffs ought to shew, in the replication, the nature of their right to have their vault supported. The defendant may say, that no such right exists as makes him liable to the obligations with which he is charged. Then, it is said, that there is only an hypothetical traverse, in this plea; but the Court will not extend the decision of *Gould v. Lasbury* (i), which has been cited. *Jones v. Bird* (k) and *Brown v. Windsor* (l), are distinguishable, because gross negligence was proved in both those cases: and it may be admitted that if the defendant has been grossly negligent, he is liable in this action.

The *eighth* plea is an answer to the declaration; because, if the defendant has not been guilty of unskilfulness or carelessness, he is not bound by law to give notice of his intention to pull down the wall. [*Tindal, C. J.*—Should you not have demurred specially, if your objection was that the declaration did not shew the plaintiffs' title with sufficient certainty? You cannot send a question of law to the jury.] The answer is, that this objection is matter of substance, and not of form; and although this is a plea with an inducement, no issue is raised upon the inducement. The issue is, whether the defendant was bound to give the plaintiffs notice, in the manner and form alleged. The objections to the second count, on the ground that it discloses no title in the plaintiffs, are stronger than to the first, because there the right is not even put on the ground of the walls being adjoining to each other. The *eleventh* plea merely traverses one of the allegations in the declaration: and the word "precautions," used by the plaintiffs, is so uncertain, that the defendant had no other mode of answering that part of the case.

R. V. Richards, in reply, was directed to confine himself to the objections to the second count.—The objection to this count ought to have been raised by special demurrer. Upon the principle, *sic utere tuo ut alienum non laedas*, the plaintiffs will be entitled to recover, if the statements made in that count are proved. Whether the defendant used reasonable and proper care in pulling down his wall, is entirely a question for the jury; and when the facts are found, the law will declare the duty which is imposed upon the defendant.

Cur. adv. vult.

TINDAL, C. J.—This is an action upon the case, the declaration in which contains two counts; in the first of which the plaintiffs allege their possession of a certain vault or cellar adjoining to certain other vaults and walls, and which in part rested upon, and was of right supported in part, by parts of the adjoining vaults and walls; that the plaintiffs were of right entitled that their vault or cellar should be so supported in part, and that there were certain foundations belonging to and supporting the said vault or cellar, which the

(h) 9 B. & Cress. 725.

(i) 1 Cr. M. & R. 254.

(k) 5 B. & Ald. 837.

(l) 2 Cr. & Jer. 20.

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plaintiffs ought to enjoy; yet that the defendant wrongfully took down and removed the said vaults and walls so adjoining to the vault or cellar of the plaintiffs, without shoring, or propping up, or taking other reasonable or proper precaution to support or secure it, so as to prevent its being weakened or destroyed, and wrongfully dug the earth and disturbed the foundations, without taking due and proper precautions to prevent the said foundations from being weakened and giving way; and the declaration then states the injury which the plaintiffs sustained, and the special damage which followed thereon. The second count states that the defendant was about to pull down the adjoining vaults and walls; and alleges it to have been the duty of the defendant, in the event of his not shoring up the walls, to give notice to the plaintiffs of his intention to pull down, and also his duty to use due care and skill, and to take due, reasonable, and proper precaution, about the pulling down his vaults and walls; and then alleges a breach of such duty. To this declaration the defendant pleads thirteen pleas, of which the first seven are pleaded to the first count, either in part or in the whole; and the eighth and subsequent pleas are pleaded, in like manner, to the second count of the declaration. The plaintiffs demur to the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and last pleas, assigning certain causes of special demurrer to each; and the defendant having joined in demurrer, the first question arises on the validity of those pleas. The fourth plea, which is pleaded only to "the not shoring or propping up the wall, or taking other reasonable or proper precautions to support or secure the vault or cellar of plaintiffs, so as to prevent the same from being weakened," we hold to be bad on two grounds. In the first place, the traverse contained in that plea, is not the traverse of any allegation to be found in the first count of the declaration. The ground of action, on which the plaintiffs rely in that count, is their right to the foundations on which their vault rested; not any duty or obligation of the defendant to prop or shore up the plaintiffs' vault, or to take due and proper precautions in pulling down his own vault. When, therefore, the defendant traverses the existence of such duty or obligation, he traverses that which is not alleged by the plaintiffs, who only mention the want of propping and shoring up, and the want of proper precaution by the defendant, as the description of the mode or means by which the injury to them was occasioned: and the second objection to this plea appears to us to be this, that it raises an issue of law, and nothing else, for the consideration of the jury; viz., whether any duty or obligation was cast by law upon the defendant, or otherwise. A jury might indeed try whether there was any duty of that nature arising from usage or contract; for the existence of any such duty is a mere question of fact; but they cannot try whether there is any such duty or obligation cast upon him by law; for that is a question to be determined only by the Court, and not by the jury. On the same grounds, and for the same reason, we hold the fifth plea to be bad in law. As to the sixth plea of the defendant, it appears to us to be bad also upon two grounds:—first, that it is a plea which confesses, without avoiding, that part of the charge in the first count, to which it professes to be an answer. This plea is pleaded, not as any answer to the right claimed in the declaration, but to that which is alleged in the first count, as a necessary and immediate consequence from the wrongful act of the defendant; that is, it is pleaded to part of the special damage alleged to have followed from the weakening of the plaintiffs' vault or cellar. But if the vault or cellar of the

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plaintiffs has been weakened in its walls or foundations, by the wrongful act of the defendant, it is no avoidance of the plaintiffs' right of action, as it appears to us that the timber, bricks, or materials that fell upon the vault or cellar, in its weakened state, were not the property of the defendant, or were not thrown there by his carelessness or negligence; but that the defendant is equally liable to answer for the injury, in whomsoever the property of those materials may be, and whether they were placed there by the act of the defendant, or of any other person. The plaintiffs have alleged in their declaration, that but for the wrongful act of the defendant, and the weakened state of the walls, and on no other account, was the vault unable to bear or resist the weight and pressure of the timber, &c. The defendant, therefore, is the proximate cause of this damage, and appears to us to be answerable for it; and we think this plea is further bad, because it denies an obligation in law; and, still further, an obligation which has not even been alleged in the declaration. The seventh plea is pleaded to the whole of the first count of the declaration. If therefore, professing to give an answer to the whole, it omits any material part, it is bad. Now the first count of the declaration is founded on the alleged wrongful act of the defendant, not only in pulling down the vaults and walls of the defendant, but also in digging the earth and disturbing the foundations of the vault or cellar of the plaintiffs; and to this cause of action, though confessed by the plea, there is no matter of avoidance pleaded in bar. The remaining pleas, to which the plaintiffs have demurred, apply themselves to the last count of the declaration; and of these we think the eighth plea cannot be supported, inasmuch as it traverses a matter of law; it is pleaded as to so much of the last count as relates to the defendant not having given the plaintiffs due and reasonable notice of his intention to pull down his walls. The allegation in this plea, that he was not bound by law or otherwise, nor was there any duty, liability, or obligation imposed on him, by law or otherwise, to give any notice of his intention to the plaintiffs, appears to us to raise a direct question of law upon an issue joined on that plea. The eleventh plea, which is pleaded to so much of the second count as alleges it to have been the duty of the defendant to have taken due and reasonable precautions about the pulling down his walls, we hold to be bad, for the same reason as the last, viz., that it raises an issue of law, instead of an issue of fact for the jury. The twelfth plea falls altogether within the same consideration as the sixth, and is bad for the same reason. The last plea to the second count of the declaration is bad for the same reason as the seventh plea, which is pleaded to a similar part of the first count, and sets up precisely the same defence. But the defendant contends that, admitting the pleas to be bad, the plaintiffs have shewn no sufficient ground of action, either in the first or second count of their declaration. The first count rests upon a precise and distinct allegation, that the vault or cellar of the plaintiffs was of right supported by parts of the adjoining walls, and that the plaintiffs were of right entitled to have them so supported, and that there were certain foundations for supporting those vaults, which the plaintiffs ought to enjoy; and the count then proceeds to allege, as part of the gravamen, that the defendant wrongfully dug the earth and disturbed the foundations, without taking due and proper precautions to prevent the foundations from being weakened; and we think, without entering into the examination of the several cases cited by the plaintiffs, this count contains a clear and substantial ground of action, viz.,

that of negligence and carelessness in the exercise of the defendant's rights, by reason whereof the plaintiffs' rights were injured; and that if the defendant meant to object that the plaintiffs' right and title was not alleged with sufficient certainty, he ought to have demurred specially to the declaration, instead of pleading over. With respect to the second count of the declaration, the right of action, as stated in that count, appears in one respect more doubtful. There is no allegation, in this count, of any right of easement in *alieno solo*, which forms the plaintiffs' ground of action in the first count; and as to the allegation that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore it up himself, it is objected, and we think with considerable weight, that no such obligation results as an inference of law, from the mere circumstance of the juxta position of the walls of the defendant and the plaintiffs. But we think ourselves not called upon, on the present occasion, to decide this question; for the count goes on to allege that it was also the duty of defendant to use due care and skill, and take due, reasonable, and proper precaution in pulling down his walls adjoining to the plaintiffs' vault; so that for want of such care, skill, and precaution, the plaintiffs' vault might not be injured. We think that duty is clearly imposed by law, and that a breach which alleges that the defendant conducted himself so carelessly, negligently, and unskilfully, in pulling down his wall, as by reason thereof to injure the plaintiffs' wall, is well assigned; and that, inasmuch as this latter allegation of duty is severable from the former, it states a good ground of action upon the whole; therefore we think the plaintiffs are entitled to judgment on the demurrers filed to the several pleas of the defendant.

Judgment for plaintiffs.

LANE v. PARSONS.

Nov. 14.

THE declaration in this case was delivered on the 28th *October*, with a notice to plead in four days. On the 29th *October*, a summons was taken out for further time to plead; and on the 31st *October*, the summons was attended, and an order, dated the 29th *October*, was made, by consent, for four days' time to plead; the defendant pleading issuably, rejoining gratis, and taking short notice of trial. The plaintiff signed interlocutory judgment for want of a plea on the 3rd *November*, and refused to receive a plea which was afterwards tendered on the evening of the same day. A rule *nisi* was obtained to set aside the judgment for irregularity. *Aspinall v. Smith (a)*.

Jervis shewed cause, upon an affidavit made by the plaintiff's attorney, which stated that it was fully understood and believed that the further time granted, was to be reckoned from the date of the order, and not from the expiration of the original time for pleading.—Unless the order expressly gives "further time to plead," the time is reckoned from the date of the order. *Simpson v. Cooper (b)* is an express authority as to the practice in this court. There the declaration was delivered on the 12th *January*, with notice to plead

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Before the time for pleading expired, a judge's order for four days' time to plead was made by consent. *Held*, that the time was to be reckoned from the date of the order, on an affidavit being made that such an interpretation was understood between the parties when the order was made.

(a) 3 Taunt. 592.

(b) 2 Scott, 840; 1 Hodges, 448.

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in four days, and on the 13th the defendant obtained a judge's order for seven days' time to plead, upon an undertaking to accept short notice of trial for the last sitting in term; and the Court held that the seven days commenced from the date of the order. In *Aspinall v. Smith* (c), there was an order for better particulars, which suspended the time for pleading.

Roberts, in support of the rule.—*Simpson v. Cooper* (d) was decided upon the ground that the defendant could not have performed his undertaking to try at the next sittings, unless the time to plead was reckoned from the date of the order; but here that objection does not apply. The rule in *Aspinall v. Smith* (c) is the correct one.

TINDAL, C. J.—Here there is the absence of the word "further" in the order; and the affidavit states, that it was expressly understood between the parties that the time was to be reckoned from the date of the order. The rule for setting aside the judgment for irregularity, must therefore be discharged; but the defendant may be allowed to plead upon the usual terms.

GASLEN, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule accordingly.

(c) 8 Taunt. 592.

(d) 2 Scott, 840; 1 Hodges, 448.

Nov. 21.

Exparte GARCIA.

A writ of *habeas corpus* was obtained against the warden of the *Fleet*, for the purpose of trying the validity of a warrant signed by commissioners of bankrupt, whereby a bankrupt was committed to prison for not answering certain questions to the satisfaction of the commissioners. The warden returned that the prisoner was in custody under detainers for debt; and that the warrant, which was directed to the keeper of *Newgate* and all other persons whom it might concern, was afterwards lodged with him. Held, that the prisoner was not entitled to a writ of *habeas corpus*, because he was not in custody under the warrant.

ATCHERLEY, Serjt., obtained a rule to bring up the body of *Garcia*, a bankrupt, by *habeas corpus*, upon the ground that he was in the custody of the warden of the *Fleet*, under a warrant of certain commissioners of bankrupt. It was alleged that the warrant was improperly issued, because the bankrupt had not given satisfactory answers to certain questions put by the commissioners, respecting the disposal of his property: he having made a very extraordinary statement, respecting a robbery from his person, of a large sum of money.

Upon shewing cause, the warden appeared in Court with the prisoner. The warden's return stated that he held *Garcia* in his custody, under detainers in five actions for debt; and that, on the 15th *June*, a warrant, a copy of which was set forth, directed to the keeper of *Newgate* and all others whom it might concern, under the hands of three commissioners of bankrupt, was delivered to him, whereby *Garcia* was committed to the custody of the keeper of *Newgate*, until he should make full answer, to the satisfaction of the commissioners, to certain questions touching his property.

Atcherley, Serjt., cited *Rex v. Kenworthy* (a) and *Rex v. Pedley* (b), to shew that the counsel shewing cause against the rule ought to begin.

(a) 1 B. & Cress. 711.

(b) 1 Leach. Crown Cases, case 122.

Wilde, Serjt., contra, contended, that the grounds of objection to the detention ought to be first stated; and the Court being of that opinion, they directed the prisoner's counsel to state the objections.

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Wilde, Serjt.—It will be unnecessary to trouble the Court upon the merits of the rule which has been obtained, because it appears, by the warden's return, that the prisoner has never yet been in his custody, under the warrant of the commissioners. The warden returns that he has the prisoner in his custody under detainers in certain actions. This is a good cause of detention, without relying upon the warrant at all. [*Tindal, C. J.*—No man has a right to a writ of *habeas corpus* to try the validity of a warrant, until he has been in custody under it. Brother *Atcherley*, you leap before you come to the stile. In whatever way we should decide this question, the prisoner could not get out of custody.]

Atcherley, Serjt.—The opinion of the Court is now sought for as to the legality of the warrant. If it be an illegal, or void warrant, the prisoner may perhaps be able to pay his debts. He has no remedy, if this be denied him; because the keeper of *Newgate*, to whom the warrant is directed, would return that he had not the prisoner in his custody; and the warden of the *Fleet* avers that he does not detain him. And the return is bad, because the warrant is not annexed. The Court ought to be able to see whether it is good upon the face of it.

TINDAL, C. J.—It seems to me that this writ would not have been granted, unless the Court had supposed that the party was actually detained by the warden under the warrant. It now appears that he is not; and therefore, the prisoner must be remanded.

GASELNE, J., VAUGHAN, J., and BOSANQUET, J., concurred.

Rule discharged.

DOE d. CAULFIELD v. ROE.

Nov. 25.

A RULE *nisi* was obtained under 1 Geo. 4, c. 87, calling upon the tenant to shew cause why he should not enter into a recognizance, and give the undertaking required by that statute. The rule was drawn up upon reading a copy of the agreement under which the tenant held the premises, with an affidavit of the execution of the original.

When an application is made against a tenant, under 1 Geo. 4, c. 87, the original deed or agreement under which the tenements are held must be produced, properly stamped.

Stephen, Serjt., shewed cause.—The statute directs, that it shall be lawful for the landlord, *producing the lease or agreement in writing*, under which the tenant held any lands or tenements for any term or number of years certain, or from year to year, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, to move the Court for a rule *nisi*. It is evident that the agreement, or a counterpart of it, ought to have been produced, and annexed to the affidavit, when the rule *nisi* was obtained, to

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enable the Court to ascertain whether the tenant had been holding the tenements under a valid agreement, with a proper stamp affixed.

The agreement was now produced, properly stamped; but it appeared, by a date affixed in the margin, that the stamp had been affixed after the rule nisi had been granted.

*Stephen*, Serjt.—Another and more important objection now arises. When this rule was granted, there was no valid agreement in existence.

*Wilde*, Serjt., in support of the rule.—It is not the practice to leave the original document in court when the rule nisi is obtained. *Tidd's Practice*, 1223, 9th ed. The agreement is now stamped, and the courts will never inquire when a stamp is affixed. *Clarke v. Jones (a)*.

*TINDAL*, C. J.—If we had seen that this agreement required a stamp, when the rule nisi was applied for, it would not have been granted. The words of the statute are very explicit; and it is made a condition precedent that the original or a duplicate of the lease or agreement shall be produced. The rule ought, therefore, to be drawn up upon reading the original document or a duplicate; but this rule is defective in both points.

*GASELER, J., VAUGHAN, J., and BOSANQUET, J., concurred.*

Rule discharged.

(a) 3 Dow. P. C. 277.

Nov. 25.

## WEYMOUTH v. KNIFE.

Where one attorney brought an action against another attorney for his bills of costs for agency business, *Held*, that the bill was not taxable.

*PETERSDORFF* obtained a rule nisi to tax the plaintiff's bill of costs.

The plaintiff was an attorney in *London*, and had brought the present action to recover the amount of certain bills of costs for agency business done for the defendant, who was an attorney in the country, between 1832 and 1835. The matter had previously been before *Park, J.*, at chambers, who declined to make any order.

*Crowder* shewed cause.—Sec. 6 of the 12 Geo. 2, c. 13, expressly enacts, that the 2 Geo. 2, c. 23, shall not extend to any bill of fees, charges, and disbursements, due from one attorney to another; and that every attorney may use such remedies for the recovery of his costs, as he might have done before the making of that act. In *Anonymous (a)*, it was said by the master, that he had never taxed a bill for agency in his life; and the Court held, that a judge's order, which had been obtained to tax an agent's bill, was irregularly obtained. The only authority on the other side is *Esparte Bearcroft (b)*, but since that case was decided, it has been held, that the Court has no common law jurisdiction to tax attorneys' bills, *Dagley v. Kentish (c)*, *Clutterbuck v. Combes (d)*.

(a) 1 Wilson, 266.  
 (c) Douglas, 200.

(c) 2 B. & Ado. 411.  
 (d) 5 B. & Ado. 400.

*Wilde, Serjt., and Petersdorff, contrd.*—This question arises after an action has been commenced, and both parties are officers of the court. In such a case, the Court has a jurisdiction, at common law, to order the bill to be taxed. In *Innes v. Hake* (e), the lord chancellor ordered an agent's bill to be taxed.

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TINDAL, C. J.—Bills of costs between an attorney and his agent, are expressly excepted out of the operation of the 2 Geo. 2, c. 23. That being the case, I am of opinion that this rule must be discharged.

GASELEE, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule discharged (f).

(e) 2 Cox, 173.

(f) In *Ex parte Bowles*, 1 Hodges, 143, this Court intimated, that there was no

common law jurisdiction to order an attorney's bill to be taxed.

### CORNISH and another v. KEENE and others.

THE declaration stated, that the plaintiff, *R. W. Sievier*, before and at the time of making the letters patent thereafter mentioned, was the true and first inventor of a certain improvement or improvements in the making or manufacturing of elastic goods or fabrics, applicable to various useful purposes, and mentioned in the letters patent thereafter in part set forth; and thereupon our lord the king, theretofore, to wit, on the 17th day of *January*, in the third year of the reign of our said lord the king, by his letters patent, bearing date at *Westminster*, the day and year last aforesaid, under the great seal of *Great Britain and Ireland*, and which said letters patent the plaintiffs now bring into court, bearing date the day and year last aforesaid; reciting, that the said *Robert William Sievier* had, by his petition, humbly represented unto our said lord the king that he had, after considerable application and expense, invented or discovered an improvement or improvements in the making or manufacturing of elastic goods or fabrics, applicable to various useful purposes, which invention he believed would be of general benefit and advantage; that he was the true and first inventor thereof, and that the same had not been made or used by any person or persons, to his knowledge or belief; and that the said plaintiff, *Robert William Sievier*, therefore humbly prayed our said lord the king would graciously be pleased to grant unto him, his executors, administrators, or assigns, our lord the king's royal letters patent under the great seal of *Great Britain*, for the sole working, constructing, making, selling, using, and exercising of his said invention, and all benefit and advantage thereof within that part of the United Kingdom of *Great Britain and Ireland*

In a patent for the improvement of the manufacture of elastic goods, one of the objects proposed by the patentee in his specification was, to produce cloth from cotton or other materials, in which should be interwoven elastic cords or strands of indian-rubber wound round with filamentous materials; after describing the manner of effecting this object, it was stated, that, by this process, a cloth was produced which should afford any degree of elastic pressure, according to the

proportion of the elastic and non-elastic material. It appeared, that the use of elastic strands of indian-rubber covered with a filamentous material, was known before, and also the use of cotton materials; but the placing them together side by side as a warp was new. It was proved, that the new manufacture formed a web which combined the two qualities of great elasticity and a limit thereto, and that it was a cheaper, lighter, and more porous article than any which had been before produced. In an action for infringing this patent, the jury found a verdict for the plaintiff, and the Court held, that this was a new manufacture within the statute of *James*, and refused to set aside the finding of the jury.

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called *England*, or our said lord the king's dominion of *Wales* and town of *Berwick-upon-Tweed*, for the term of fourteen years, according to the statute in that case made and provided: and that our lord the king, being willing to give encouragement to all arts and inventions which might be for the public good, was graciously pleased to condescend to the petitioner's request. It is made known, among other things, that our said lord the king, of his special grace, certain knowledge, and mere motion, had given and granted, and by the said letters patent, for our said lord the king, his heirs, and successors, did give and grant unto the said *Robert William Sievier*, his executors, administrators, and assigns, our said lord the king's especial license, full power, sole privilege, and authority, that he, the said *R. William Sievier*, his executors, administrators, and assigns, and every of them, for himself and themselves, or by his and their deputy or deputies, servants, or agents, or such others as he, the said *Robert William Sievier*, his executors, administrators, or assigns, should at any time agree with, and no others, from time to time, and at all times during the term of years therein expressed, should and lawfully might make, use, exercise, and vend his said invention, within that part of our said lord the king's United Kingdom of *Great Britain* and *Ireland* called *England*, our said lord the king's dominion of *Wales*, and town of *Berwick-upon-Tweed*, in such manner as to him, the said *Robert William Sievier*, his executors, administrators, and assigns, or any of them, should, in their or his discretions, seem meet: and that he, the said *Robert William Sievier*, his executors, administrators, and assigns, should and lawfully might have and enjoy the whole profit, benefit, commodity, and advantage, from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years therein mentioned; to have, hold, exercise, and enjoy the said license, powers, privileges, and advantages thereinbefore granted, or mentioned to be granted, unto the said *Robert William Sievier*, his executors, administrators, and assigns, for and during and unto the full end and term of fourteen years from the date thereof, and fully to be complete and ended, according to the statute in that case made and provided. And to the end that he, the said *Robert William Sievier*, his executors, administrators, and assigns, and every of them, might have and enjoy the full benefit and sole use and exercise of the said invention, according to our said lord the king's gracious intention thereinbefore declared, our said lord the king did, by the said letters patent, for himself, his heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other our said lord the king's subjects whatsoever, of what estate, quality, degree, name, or condition soever the same might be, within the said part of our said lord the king's United Kingdom of *Great Britain* and *Ireland* called *England*, our said lord the king's dominion of *Wales* and town of *Berwick-upon-Tweed*, aforesaid; that neither they nor any of them, at any time during the continuance of the said term of fourteen years thereby granted, either directly or indirectly, should make, use, or put in practice the said invention, or any part of the same, so attained unto, by the said *Robert William Sievier* as aforesaid, nor in any wise counterfeit, imitate, or resemble the same, nor should make or cause to be made any addition thereunto or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, deviser or devisers thereof, without the license, consent, or agreement of the said *Robert William Sievier*, his executors, administrators, or assigns, in writing under his

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or their hands and seals, first had and obtained in that behalf, upon such pains and penalties as could or might be justly inflicted on such offenders for their contempt of that our said lord the king's royal command; under and subject to, amongst others, a certain proviso, that, if the said *Robert William Sievier* should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in our said lord the king's High Court of Chancery, within six calendar months next and immediately after the date of those our said lord the king's letters patent, that then those our said lord the king's letters patent, and all liberties and advantages whatsoever thereby granted, should utterly cease, determine, and become void, any thing thereinbefore contained to the contrary thereof in any wise notwithstanding, as in and by the said letters patent, reference being thereunto had, will, among other things, fully appear. And the said plaintiffs, in fact, say, that the plaintiff, *Robert William Sievier*, did, afterwards, and within six calendar months next and immediately after the date of the said letters patent, to wit, on the 15th day of *July*, 1833, in pursuance of the said proviso and of the said letters patent, particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing, under his hand and seal, and caused the same to be enrolled in our said lord the king's High Court of Chancery, within the said space of six calendar months then next and immediately after the date of our said lord the king's letters patent, as by the record of the said instrument in writing now remaining of record in the said High Court of Chancery, more fully appears. And the plaintiffs further say, that, afterwards, and after the said plaintiff, *Robert William Sievier*, had perfected his said invention, and after the granting of the said letters patent as aforesaid, to wit, on the 7th day of *April*, 1834, the plaintiff, *Robert William Sievier*, duly assigned unto the plaintiff, *Thomas Cornish*, a certain part, share, or interest, to wit, one undivided half part, share, or interest, of him the plaintiff, *Robert William Sievier*, in the said invention, and the benefit and advantage thereof, under and by virtue of the said letters patent (a); and they the plaintiffs afterwards, to wit, on the day and year last aforesaid, became and were, and still are, interested, in form aforesaid, in the said invention and in the said letters patent and the benefit and advantage thereof: and the plaintiffs, in fact, further say, that the said *Robert William Sievier* always, from the granting the said letters patent, as aforesaid, down to and at the time of making the said assignment of the said part, share, or interest therein to the said *Thomas Cornish* as aforesaid, did, and they the plaintiffs, *Thomas Cornish* and *Robert William Sievier*, thenceforth have always, by himself and themselves respectively, his and their servants and agents, in that behalf made and exercised and vended the said invention, to his and their great advantage and profit respectively; yet the said defendants, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure the plaintiffs, and to deprive them of the said profits, benefits, and advantages, which they might and otherwise would have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters patent, and after the said assignment by the plaintiff, *Robert William Sievier*,

(a) See the proceedings on a writ of error to the Exchequer Chamber, where this averment in the declaration is considered. 3 Hodges.

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of the said part, share, or interest therein, to the said *Thomas Cornish* as aforesaid, and after they the plaintiffs so became interested therein as aforesaid, and within the said term of years in the said letters patent mentioned, to wit, on the first day of *April*, 1834, and on divers other days and times between that day and the commencement of this suit, within that part of the United Kingdom of *Great Britain and Ireland* called *England*, our said lord the king's dominion of *Wales*, and the town of *Berwick-upon-Tweed*, unlawfully and unjustly, and without the license, consent, or agreement of the said plaintiffs, or either of them, in writing, under their or either of their hands and seals, or otherwise howsoever, for that purpose had and obtained, and against the will of the plaintiffs and each of them, did make, use, and put in practice the said invention and divers parts of the same, and did also, on the several days and times aforesaid, counterfeit, imitate, and resemble the said invention; and, on the several days and times aforesaid, did also make and cause and procure to be made, divers additions to, and divers subtractions from, the said invention, whereby they pretended to be the inventors and devisers thereof; and, on the several days and times aforesaid, did vend and sell, and cause and procure to be vended and sold, divers large quantities, to wit, 50,000 pieces and 1,000,000 yards of certain elastic goods and fabrics manufactured according to and by means of the said invention, and divers large quantities of elastic goods and fabrics, to wit, 50,000 pieces of elastic goods, and 1,000,000 yards of a fabric in imitation of certain elastic goods and fabrics manufactured by the plaintiffs, by themselves, their servants, and others employed by them, by means of the said invention; in breach of the said letters patent, and against the privilege so granted to the said plaintiff, *Robert William Sievier*, and his assigns, as aforesaid; whereby the plaintiffs have been and are greatly injured, and deprived of a great part of the profits and advantages which they might and otherwise would have derived and acquired from the said invention; to the damage of the plaintiffs of 3000*l*.

The defendants craved oyer of the said letters patent; and pleaded, *first*, not guilty. *Second* plea, that the plaintiff, *Robert William Sievier*, was not, before and at the time of the making the said letters patent, the true and first inventor of any improvement or improvements in the making and manufacturing of elastic goods or fabrics, applicable to various useful purposes, in manner and form as the plaintiffs had in their declaration alleged. Conclusion to the country. *Third* plea—that the said alleged invention or discovery in the said letters patent and instrument in writing, mentioned, described, and ascertained, was not, before and at the time of the making the said letters patent, a new invention, as to the public use and exercise thereof in that part of the United Kingdom of *Great Britain and Ireland, Wales, or Berwick-upon-Tweed*; nor was the same invented or found out by the said *Robert William Sievier*, by reason whereof the said letters patent were and are wholly void. Conclusion with a verification. *Fourth* plea—that the said alleged invention, in the said letters patent mentioned, described, and ascertained, was not an improvement in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes. Conclusion to the country. *Sixth* plea—that the plaintiff, *Robert William Sievier*, did not particularly describe and ascertain the nature of his alleged invention, and in what manner the same was to be performed, by any instrument in writing, in manner and form as the plaintiffs had in their said declaration in that behalf alleged. Conclusion to the country.

*Replication*—to the first and second pleas, a *similiter*; to the third plea, that the said invention or discovery in the said letters patent and instrument in writing mentioned, described, and ascertained, was, before and at the time of the making of the said letters patent, a new invention as to the public use and exercise thereof, in that part of the United Kingdom of *Great Britain*, &c. and the same was invented and found out by the said *R. W. Sievier*. To the fourth and fifth plea, a *similiter*.

The patent, which was sealed on the 17th *January*, 1833, was taken out “for an improvement or improvements in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes.” The specification, enrolled on the 6th of *July*, 1833, described the invention in the following manner:—“The *first* object I propose, is to manufacture an article by the ordinary knitting frame, or similar kind of machinery, in which cords or strands of indian-rubber shall be introduced between the loops or stitches of the fabric, for the purpose of forming elastic cords or bands round the margins or other parts of stockings, socks, gloves, night-caps, drawers, and various other articles of clothing. The *second* object is to manufacture, in the ordinary loom, an elastic woollen cloth, by the introduction of cords or strands of indian-rubber among the longitudinal threads or yarns which constitute the chain or warp, and also among the transverse threads or yarns, which constitute the weft or shoot, and which cloth shall be capable of being afterwards felted and dressed with a nap.

“The *third* object is, to produce cloth from cotton, flax, or other suitable material, not capable of felting, in which shall be interwoven elastic cords or strands of indian rubber, coated or wound round with a filamentous material.

The first of these improvements I effect, by preparing knitting frames, or other similar machines in the usual way, for the production of the knitted materials, called “stocking fabric;” and when the same are set to work, and the fabric has been manufactured by the ordinary knitting process, up to the part at which I desire to introduce the elastic cords or strands, I then, by the adjusting screws of the machine, provide for elongation or contraction of the lengths of the loops or stitches, of the row next to be produced across the machine, in order to form a channel to receive the said elastic cord or strand; and having prepared fine strips of indian-rubber, which may, if desired, be coated or covered with a filamentous material as described in the specification of my patent, dated the 1st *December*, 1831, I conduct such thread, cord, strand, or strip of indian-rubber, by means of a long needle, hook, pincers, or other suitable apparatus, answering the purpose of a shuttle, across the machine, between the row of stitches or loops which were last made, and those which are then about to be formed; and having drawn the said indian-rubber thread, cord, or strand, straight and smooth, I complete the last-mentioned row of loops or stiches by the ordinary movements of the machine, which incloses the indian-rubber thread, cord, or strand, and keeps it securely in its place, interwoven with the threads of the fabric. A second thread of india-rubber is, in like manner, introduced between the next or other subsequent row of stitches, and in the same way confined; and any further number of these threads, cords, or strands, may, by the same means, be inserted and interwoven into the fabric, at such parts as may be required, for the purpose of producing (when the selvages are connected or whipped together,) elastic bandages, garters, or bracings round the stocking, sock, glove, night-cap, or other article of wearing apparel. In effecting the *second* improvement for the production of an elastic

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woollen cloth, I introduce into the loom, among the longitudinal or warp threads, cords or strands of indian-rubber, or I constitute the warp entirely of such strands, either covered with a filamentous material or not, and through or between the warp threads, cords, or strands of warp, I pass the transverse weft or shoot-threads or yarns in the ordinary way of weaving, for the purpose of effecting that intervention which produces the cloth; these transverse weft-threads being composed in part of the indian-rubber strands, or of the ordinary threads or yarns of the fabric, according as I may wish to produce a cloth, which shall be elastic lengthwise only, or in both directions. If the elastic cloth so produced, should be intended for outward garments with a nap upon its surface, I should employ, in connection with the indian-rubber strands, yarns spun from short wool, which, after having been woven, I should finish as the woollen cloths are usually finished, that is, felt the wool in the fulling stock, raise the pile by gig machinery, or by hand cards or teazles, and afterwards shear the nap down to a fine smooth surface. In manufacturing the elastic cloth from cotton, flax, or other material, which is not intended to be milled or fulled, I introduce into the fabric, threads or strands of indian-rubber, which have been previously covered, by winding filaments tightly round them, through the agency of an ordinary covering machine, or otherwise; these strands of indian-rubber being applied as warp or weft, or as both, according to the direction of the elasticity required. By this combining, the strands of indian-rubber, with yarns of cotton, flax, or other non-elastic material, I am enabled to produce a cloth which shall afford any required degree of elastic pressure, according to the proportions of the elastic and non-elastic material. It remains only to add, that the strands of indian-rubber are, in the first instance, stretched to their utmost tension, and rendered non-elastic as described in my former specification; and being in that state introduced in the fabric, they acquire their elasticity by the application of heat, after the fabric is made. Lastly, as my invention consists solely in the employment of strands of indian-rubber, in connection with yarns, in the way described for manufacturing elastic goods or fabrics, I have not deemed it necessary to describe any particular kind of machinery for carrying the same into effect, as such machinery is well known, and forms no part of my invention."

The cause was tried before *Tindal, C. J.*, and a special jury, at the *Middlesex* sittings, after *Michaelmas* Term, 1835. The plaintiffs proved, that the first and second objects mentioned in the specification, had been attained by the patentee; and that the articles therein described were both new and useful, and the defendants offered no evidence to shew the contrary.

The whole case turned upon the validity of the patent, as it respected the elastic cloth or web, which was the third object stated to have been attained. It appeared, that this fabric was a cloth or web, which consisted of strands of indian-rubber, covered in the manner stated in the specification, interstratified with threads of cotton, silk, or other fibrous matter in the same plane, which strands of indian-rubber, were placed at such distances from each other as might be required. Any degree of contractile force was given by increasing the number of indian-rubber strands, but as the number of these strands was diminished, the fabric became proportionately porous. The last-mentioned manufacture was described as being very advantageous when used as surgical bandages, because any degree of elasticity which might be required was pro-

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duced, whilst the bandage was light and porous. The elastic and non-elastic strands were united together by the web-thread, but longitudinally they were independent of each other; and the non-elastic threads sustained no tension until the web was drawn out to a considerable extent. The consequence was, that the elasticity of the fabric was not impaired, until the tension came to the point at which the elasticity was limited, and then the non-elastic strands preserved the other strands from being broken.

The web which had been previously manufactured, was described as requiring a greater quantity of elastic material, which made the fabric heavier, more expensive, less porous, and less elastic; and that it offered more resistance, without being ultimately stronger. It was proved for the plaintiffs, by the evidence of several persons who had been engaged in the sale of web for braces, for many years, that no fabric similar to that manufactured by the plaintiffs, was brought to their notice previously to 1833; and several weavers stated that they had never seen the article, until they had made it whilst in the service of the plaintiffs, after the date of the patent; and that the directions contained in the specification, were sufficient to enable a person of ordinary skill to produce the articles there described.

The defendants put in evidence two former patents which had been granted for the use of caoutchouc. The first to the plaintiff, *Siever*, which was sealed 1st December, 1831, and enrolled June, 1832. The specification was as follows:—"This invention consists in the application or employment of filaments, threads, or strands of caoutchouc or indian-rubber, to or for the making, manufacturing, or constructing of elastic cables, ropes, whale, fishing, and other lines, lathe and rigger bands, bags and purses; such filaments, threads or strands of caoutchouc or indian-rubber, being previously plated over or covered with hemp, flax, silk, wool, cotton, catgut, indian grass, strips of leather, or other fit and proper materials, part of which articles, when so manufactured are applicable to various other purposes, as filaments or threads of indian-rubber, covered with cotton, silk, and other materials, are now commonly used in the manufacture of many articles where elasticity is required; and as such filaments or threads are covered with different materials, by various kinds of machines applicable to the purpose, it is not necessary for me to describe any particular machinery, by which the filaments, threads, or strands of indian rubber, required for the different articles to be manufactured in my improved manner, are to be platted, intermixed, or covered with the materials; I, therefore, shall only state generally, that the filaments, threads, or strands of caoutchouc, are prepared by cutting them from any convenient sized or shaped piece of indian-rubber into long strips, which are afterwards stretched to their utmost tension, and wound upon drums, reels, or bobbins, ready to be platted over or covered by or interwoven with the various materials before mentioned." After describing the mode of applying the invention in the manufacture of cables, &c. the specification proceeded.—"My improved bags and purses are composed of knitting or net-work, made of strands or cords of the filaments, prepared as above described, and which are capable of being made into purses or bags by hand, or the filaments, strands, or cords prepared as above described, may be knitted, netted, or platted into purses or bags by machinery or by hand. As there are so many descriptions of bags, to which these improvements in the construction may be applicable, it is not necessary to state further than that, in any case, where elasticity may



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be required, the bag or purse may be made wholly of the above materials, or only parts used; for instance, in making carpet travelling bags, I should only form the ends or edges of the bags of the elastic material, covered, when stretched to its utmost extension, with leather or other suitable substance, which will be capable, on collapsing, of drawing up the leather or other covering into puckers or gathers, so as to allow of the bag enlarging very considerably when any extra quantity of articles are put into it."

The other was a patent granted to one *Hancock*, sealed 8th August, 1820, for an invention of an application of a certain material to various articles of dress, and other articles, that the same might be rendered more elastic. The specification contained the following statement:—"The material I use, is caoutchouc; I cut it into slips of a convenient length and thickness, according to the purpose for which it is to be used, and the degree of elasticity necessary. If the quality of the caoutchouc is not the best, or the spring is not required to be very substantial, I prepare these strips by putting them into hot water, and steeping them a while to prevent their cracking on the edges; when the substance of the spring is required to be more considerable, or the quality of the caoutchouc better, I use it without such preparations. I apply the caoutchouc spring to gloves in the following manner:—A case or pipe of leather, linen or cotton, or other similar material, is made as long as it is necessary the spring should stretch; the spring is then fastened at the extremities of the pipe or case, by sewing or otherwise, in such a manner as that the pipe may contract and gather up very considerably. The case or pipe is then fixed in the wrist of the glove, so as to contract the glove to the size of the wrist, care being taken not to make the spring so strong, but that the glove will easily draw over the hand. The case or pipe may be made in the glove itself, and the spring be introduced in the manner I have described. Attention must be paid in fastening the caoutchouc, that it is not pierced any where between the extremities by the needle, otherwise it will be liable to tear and break. In a similar manner, I apply the caoutchouc spring to any other article of dress where elasticity is desirable at any particular part. I apply the caoutchouc springs to waistcoats and waste bands, to make them contract and sit close to the body; to coat sleeve linings, to draw them closer round the waist; to the mouth of pockets, to prevent their contents from falling out when in an inverted position, and prevent their being easily picked; to trowsers and to gaiterstraps, to enable them to lengthen and shorten to the bend of the knees and ankle joints; to braces instead of wire and other springs as now commonly used; to stockings, to prevent their slipping down the leg; to garters, to shirt-wrists, to the knees of drawers and breeches, to wigs, false curls and fronts to keep tight on the head; to pocket books and purses, instead of the strop and loop, and wire springs; to riding belts, to stays, and such part of the apparel and dress of women, as require to be kept close to the person, and yet to be elastic; as fastenings to boots, shoes, clogs, and pattens, when the object is, to take them off and on without any difficulty of unlacing or untying. I apply caoutchouc to the soles of boots, shoes, and clogs, by making either the whole sole of caoutchouc, or the inner or outer sole only, or by fastening a piece of caoutchouc between the soles; and in either case, boots, shoes, and clogs, are rendered more elastic to the foot. I apply the caoutchouc springs to stiffeners of neckcloths; I use caoutchouc in springs to render them elastic to the foot, by forming a piece to the bottom of

the stirrup, which I fasten in by having holes drilled in the stirrup and sewing in the caoutchouc with wax thread or wire, or by rivetting or screwing it on with iron. In this specification, I do not insist upon any particular mode of applying or fastening caoutchouc to the various articles described, my object being to produce and apply a better kind of spring than any now in use, for the purposes above-mentioned."

The defendants contended, that the fabrics described in the specifications, published with the patents, obtained by *Hancock*, and by *Sievier* in 1831, were produced upon a principle exactly similar to those which had been subsequently manufactured under the last patent, and that they involved the discovery of those manufactures. A considerable number of witnesses were also called, to prove that they had manufactured a fabric, similar to that which it was the third object of the patentee to produce, before the introduction of the patent article; and an attempt was made to shew, that the defendants had also previously manufactured it; but a witness called for the plaintiffs, who had been a weaver in the defendants' manufactory, denied the truth of this statement. Some of the defendants' witnesses stated, that the new article was inferior to the old one; but others admitted, that the use of the latter had been superseded, by the introduction of the former. It was admitted, that the defendants had infringed the patent. The learned judge left the several issues to the jury: and with respect to the question, whether the plaintiffs' was a new invention, his lordship told the jury that to entitle the defendants to a verdict upon that issue, it must be proved that the article was previously in public use amongst persons in the trade; and that it was not sufficient to prove such a manufacture of it, as was only referable to mere experiments made for the purpose of a discovery, and confined to the knowledge of the party who was making it. The jury found a verdict for the plaintiffs, with nominal damages.

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In *Hilary* Term, 1836, Sir *F. Pollock* obtained a rule *nisi*, to enter a nonsuit, on the ground, first, that the manufacture described in the specification was not the subject of a patent, *Saunders v. Aston* (a), and *Brunton v. Hawkes* (b); and secondly, that the specification was insufficient. The rule was also drawn up for a new trial, upon the ground that the verdict was against the evidence; and upon an affidavit that, since the trial, the defendants had discovered that a similar patent to the one in question, had been granted to one *Desgrand*, in *November*, 1832.

The *Attorney-General*, *Wilde*, Serjt., *Stephen*, Serjt., and *Hindmarch*, shewed cause. First, the jury have found that this was a new manufacture within the meaning of the statute of *James*; and, therefore, there must be a clear reason shewn for disturbing the verdict on this ground. When the title and specification are read together, the various objects for which the manufacture was designed, are found clearly and intelligibly stated. It is true that before this patent, elastic strands were well known; but the novelty now introduced is, the union of elastic and non-elastic strands, so as to produce a limited elasticity. Fabrics with elastic strands alone, may be extended until they break, but by the introduction of the non-elastic strands the elastic pressure is limited, according to

(a) 3 B. & Adol. 831.

(b) 4 B. & Ald. 541.

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the proportions of the elastic and non-elastic materials. This intermixture of elastic and non-elastic materials, was clearly a new manufacture; and it was abundantly proved, that the advantages derived from the discovery were very great. The expenditure of the indian-rubber was diminished, and a lighter and more porous article than any which had been known before, was introduced. Secondly, the specification is perfectly intelligible, and although more scientific words might have been used in some instances, yet that would have rather increased the difficulty of understanding the subject. It states the nature of the discovery, and the manner in which it is to be carried into effect; and it has never been considered necessary to describe an ordinary loom or other machine. But the objection to the specification cannot be made in the present state of the record. The fifth issue alone is relied upon as raising the question. Now, in the fifth plea, the defendants say, "that the plaintiff did not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed by any instrument in writing." This is equivalent to a plea, that no specification was enrolled; but the defendants cannot shew that an insufficient specification was enrolled. In *Derosse v. Fairie* (c), there was a plea very similar to the present, but the Court doubted whether any objection to the sufficiency of the specification could be made. *Praed v. The Duchess of Cumberland* (d), was an action in debt on an annuity bond, and the defendant pleaded, that there was no such memorial as the statute required; to which the plaintiff replied, that there was a memorial containing the names of the parties, and the consideration given. The plaintiff having rejoined that the consideration was untrue, alleged in the memorial, the Court held, that this was a departure; that a memorial was enrolled which upon the face of it was a good one, and that if the defendant wished to impeach it, he should have shewn in what particular it was defective, and then have compelled the plaintiff to take issue upon that fact. *Morgan v. Man* (e), and *Roberts v. Marriet* (f), is to the same effect. And such a mode of pleading, in this instance, would be objectionable, not only as being a departure, but as leaving matter of law to the jury; and, notwithstanding the decision in *Fisher v. Pembley* (g), it has always been the practice to plead a defect in a memorial, according to the rule laid down in *Praed v. The Duchess of Cumberland* (d). And now that the plea of the general issue is no longer in force, in the spirit of the new rules, which require all matters to be specially pleaded, it is expedient that the ancient mode of pleading should be resorted to in this instance. The issue raised is, whether the invention was described by the plaintiff by any instrument in writing, and not whether the instrument is sufficient to support the patent, or whether it sufficiently describes the mode of manufacture, or whether it claims too much.

Sir F. Pollock, Creswell, and Knowles, in support of the rule. First, as to the question of novelty. The plaintiffs are bound to support the affirmative of the issue, that the invention is new, and was the invention of Sievier. Now, the introduction of indian-rubber strands into knitted goods was known: and also the use of it, as described in *Hancock's* patent, and in *Sievier's* first patent. Covered strands of indian-rubber were also intermixed with strands of other materials. So that there was nothing new in the materials which were used,

(c) 1 Gale, 109.  
(d) 4 T. Rep. 585.  
(e) 1 Siderfin, 180.

(f) 2 Saund. 188.  
(g) 11 East, 188.

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nor in the mode of preparing them, nor in the mode of weaving them. It has been contended, that the alternate mode of placing the strands, is the subject of a patent. But, if that were so, then a patent might be taken out for introducing a particular number of each material, as one elastic strand in combination with three non-elastic strands. It is quite clear, that the substitution of one material for another in making a manufacture, is insufficient to support a patent. Thus, in *Walker v. Congreve* (i), where the invention was for a gun-barrel, Sir John Leach, V. C., observed, "Though new, the invention was not of such a nature as to come within the statute of monopolies, and did not exhibit such proof of skill and invention, as entitled it to the protection of that law which encouraged the exertions of genius, by enabling its possessors to reap, more exclusively, its reward. Every thing was not an invention worthy of a patent, nor could every original former of a machine, be called an inventor. Every novelty was not an invention entitled to the protection of the statute. A new principle must be discovered, skill and ingenuity must be exerted, to entitle an inventor to a patent; the making of an old machine of new materials could not be a discovery, and the plaintiff could claim no protection for an invention, the only merit of which consisted in being made of brass instead of wood. When tea was first introduced into this country, earthenware tea-pots were used, but could a person who made the first one of silver, be entitled to a patent, restraining all his fellow-subjects from using silver tea-pots, except these bought of him?" *Brunton v. Hawkes* (k). If a new article were prepared in a new manner, the case might be different; but here, an elastic article and a non-elastic article had already been used in combination, and the only difference is, that a less quantity of one than the other, is directed to be used. A combination of two things, neither of which are new, is not the subject of a patent, although they might not have been combined before. Thus, in *Saunders v. Aston* (l), which was a patent for a new button, *Littledale, J.*, said, "Neither the button nor the flexible shank was new; and they did not, by being merely put together, constitute such an invention as could support this patent." And, if a patent fails in one of its objects, it is altogether void, *Brunton v. Hawkes* (k). Secondly, the plea is correctly framed, to entitle the defendants to object that the specification is insufficient. The plaintiffs aver, that they enrolled a specification containing certain matters. The defendants say, they did not enrol a document containing these matters. That is a question of fact, because it is clearly a matter of evidence, whether the specification be sufficient or not. In *Dudlow v. Watchhorn* (n), the true ground of the decision in *Praed v. The Duchess of Portland* (o) is stated; and it was held sufficient to aver, that no writ of *capias* was *duly* issued against the defendant. The new rules of pleading do not make any difference in this respect. In *Wakeman v. Sutton* (p), where a defendant in assumpsit pleaded, that the contract declared upon was, a guarantee for the debt of another, and that no memorandum thereof, stating the consideration, was in writing, signed by the defendant, or any person authorized by him; it was held, that the plaintiff might reply, that a memorandum of agreement in writing stating the consideration, was signed by the

(i) Godson on Patents, 68.

(k) 4 B. & Ald. 455; Godson on Patents, 69.

(l) 3 B. & Adol. 886.

(n) 16 East. 39.

(o) 4 T. Rep. 485.

(p) 2 Ado. & Ellis, 78.

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defendant, without setting out such memorandum in the replication. *Lysaght v. Walker* (q) is to the same effect, overruling *Lowe v. Eldred* (r). There is nothing in the specification, to shew that the indian-rubber strands were to be placed in the same plane, or that they worked independently of each other; and if the article be made without placing the strands in the same plane, then the invention is, in all respects, similar to that which is described in *Sievier's* patent of 1831.

*Cur. adv. vult.*

TINDAL, C. J.—The discussion on this case arises on a motion to the Court to set aside a verdict obtained by the plaintiffs, as assignees of the original patentee, in an action for the infringement of a patent, and to grant a new trial upon three grounds:—first, that, in point of law, the invention for which the patent was taken out was not the subject-matter of a patent; secondly, that the verdict was against the evidence given at the trial; and, thirdly, upon facts disclosed in an affidavit. The patent in question, which bore date the 17th of *January*, 1833, was “for an improvement or improvements in the making or manufacturing of elastic goods or fabrics, applicable to various useful purposes;” and the patentee, in his specification, which was enrolled in *July*, 1833, described his invention, in general terms, to be designed for the production of an elastic web-cloth, or other manufactured fabric for bandages, and for such articles of dress as the same might be applicable to; and then described, more particularly, the three distinct objects which the patentee proposed. At the trial of the cause, it was admitted, on the part of the defendants, that the principal ground on which the patent was sought to be impeached, was with reference to the third object described in the specification; and the whole of the evidence produced by the defendants, and the main part of the argument before us, applies itself to that object alone. The third object proposed by the patentee was to produce cloth from cotton, flax, or other suitable material, not capable of felting, in which shall be interwoven elastic cords, or strands of indian-rubber, coated or wound round with filamentous material. The patentee afterwards describes the mode of effecting the third object to be, by introducing into the fabric, threads or strands of indian-rubber, which have been previously covered by winding filaments tightly round them, through the agency of an ordinary covering machine or otherwise: these strands of indian-rubber being applied as warp or weft, or as both, according to the direction of the elasticity required; that, by thus combining the strands of indian-rubber with yarns of cotton, flax, or other non-elastic material, the patentee was enabled to produce a cloth which should afford any degree of elastic pressure, according to the proportions of the elastic and non-elastic material. The patentee added, that the strands of indian-rubber were, in the first instance, stretched to their utmost tension, and rendered non-elastic, as described in a former specification to another patent; and being in that state introduced in the fabric, they acquire their elasticity by the application of heat after the fabric is made. Now the first objection made to the patent so described is, that the invention is not the subject-matter of a patent; that it is neither a new manufacture, nor an improvement of any old manufacture, but is merely the application of a known material, in a known

(q) 5 Bligh. N. S. 1.

(r) 1 Cr. & M. 239.

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manner, to a purpose known before. The question, therefore, as to this point, is, does it come under the description of "any manner of new manufacture," which are the terms employed in the statute of *James*? That it is a *manufacture*, can admit of no doubt; it is a vendible article, produced by the art and hand of man: and of all the instances that would occur to the mind, when inquiring into the meaning of the terms employed in the statute, perhaps the very readiest would be that of some fabric or texture of cloth. Whether it is new or not, or whether it is an improvement of an old manufacture, was one of the questions for the jury upon the evidence before them; but that it came within the description of a manufacture, and so far is an invention which may be protected by a patent, we feel no doubt whatever. The materials, indeed, are old, and have been used before; but the combination is alleged to be, and, if the jury are right in their finding, is new; and the result or production is equally so. The use of elastic threads or strands of indian-rubber, previously covered by filaments wound round them, was known before; the use of yarns of cotton, or other non-elastic material, was also known before; but the placing them alternately side by side together as a warp, and combining them by the means of a weft, when in extreme tension and deprived of their elasticity, appears to be new; and the result, namely, a cloth in which the non-elastic threads form a limit, up to which the elastic threads may be stretched, but beyond which they cannot, and therefore cannot easily be broken, appears a production altogether new. It is a manufacture at once ingenious and simple. It is a web combining the two qualities of great elasticity, and a limit thereto. The second objection to the verdict is, that it is against the evidence. The only issue to which this objection has applied itself in the course of the argument, is the issue whether the invention was new, as to the public use thereof in *England*. Now the evidence at the trial, which applied itself to this question, consisted of two perfectly distinct heads or classes: the documentary evidence of former patents and specifications, and the parol testimony of the witnesses. It was urged that the present invention was, in the whole or a material part of it, already known to the public by the specification to the patent obtained by *Hancock*, which was enrolled in *August*, 1820, and the specification to the former patent enrolled by *Siever*, in *June*, 1832. As to *Hancock's* patent, it is manifest that if it applied at all to the invention for which the patent now under discussion was taken out, it applied only to the first object stated in the specification, all contention as to which object was given up at the trial. But the description in *Hancock's* patent shews a material distinction between his discovery and that of *Siever*. *Hancock's* patent was taken out for a discovery "of the application of a certain material to certain articles of dress, by means of which the same may be rendered more elastic;" and the mode by which this was effected is described in the specification to be that "of applying strips of indian-rubber into cases or pipes formed in the article after it was complete." The first object of *Siever's* patent, is that of introducing the cords or strands of indian-rubber between the loops or stitches of the fabric, so as to form a constituent part of the fabric itself; and as to the former patent of *Siever*, it was a patent taken out for the making of cables, ropes, whale-fishing, and other lines, lathe and rigging bands, bags, and purses, of filaments or threads of indian-rubber covered with cotton or other materials; the bands and bags were to be knitted, not woven, and there was no attempt to mix with them any non-elastic material to

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strengthen them, or to form a limit to their elasticity, or for any other purpose. These patents, therefore, do not by any means, as it appears to us, impeach the novelty of the present invention. As to the evidence of the various witnesses brought forward, on each side, at the trial, it must be admitted that there was evidence on both sides. The question raised for the jury was this:—Whether the various instances brought forward by the defendants amounted to proof, that before or at the time of taking out the patent, the manufacture was in public use in *England*, or whether it fell short of that point, and proved only that experiments had been made in various quarters, and had been afterwards abandoned? This question is, from its nature, one of considerable delicacy; a slight alteration in the effect of the evidence will establish either the one proposition or the other, and the only proper mode of deciding it is by leaving it to the jury. On the present occasion, they heard the evidence patiently, and appeared to apply it with intelligence; and we can see no reason to be dissatisfied with the conclusion at which they arrived. With respect to the third ground upon which the rule to shew cause was obtained in this case, viz., that since the trial the defendant has discovered a patent taken out by one *Desgrand*, the patent being sealed in *November*, 1832; without entering into the question whether the invention for which the patent in dispute was taken out, was or was not described in the specification of *Desgrand*, we think it sufficient to observe that this specification was not enrolled till *May*, 1833, whereas the article made under the plaintiff's patent was publicly made and sold upon the *London* market, to a very large extent, in *March* and *April* of the same year; and, although the specification of *Sievier's* patent was not enrolled till *July*, 1833, we think the mere fact of the enrolment of *Desgrand's* specification after the plaintiff's patent was sealed, and his discovery known upon the market, does not, of itself alone, afford any proof whatever of the want of novelty in the manufacture made under the plaintiff's patent. We therefore think there is no ground for disturbing the verdict, and that the rule for a new trial must be discharged.

Rule discharged.

### The BANK OF ENGLAND v. ANDERSON and others.

By stat. 3 & 4 Wm. 4, c. 98, it is enacted, that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in *London*, or within sixty-five miles thereof; provided that such body politic or corporate, or society, or company, or partnership, do not borrow, owe, or take up in *England*, any sum or sums of money on their bills or notes, payable on demand, at any less time than six months from the borrowing thereof:—*Held*, that a co-partnership consisting of more than six persons, and carrying on the trade or business of bankers within the distance of sixty-five miles from *London*, cannot, in the course of such trade as bankers, accept a bill of exchange payable at less than six months from the time of the giving of such acceptance.

HIS Honour the Master of the Rolls sent for the opinion of this Court the following

#### CASE.

The *London* and *Westminster* Bank is a co-partnership, consisting of more than six persons, united in covenants, carrying on in *London* all such parts of the business of banking as are usually carried on by *London* private bankers. Mr. *George Alfred Muskett* is a proprietor of shares in the said *London* and

Whether such an acceptance be unlawful, when given by more than six persons in partnership, but not as bankers, for their private debts, *quere*.

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*Westminster Bank*, and became such by a purchase of shares from a former shareholder. Mr. *George Alfred Muskett* carries on business as a banker at *St. Albans*, which is a town within sixty-five miles of *London*, in the county of *Hertford*, on his own sole account, and is registered at the Stamp-Office as the sole person interested in such bank, under the style and firm of the bank of *St. Albans*. The said *George Alfred Muskett* keeps a banking account with the *London* and *Westminster Bank*; and the *London* and *Westminster Bank* act as the *London* agents of the said *George Alfred Muskett*, and receive and collect for him his *London* monies, place the same when received to his credit, and hold the same at his disposal, as *London* bankers usually do for their customers. The Bank of *St. Albans* has not any connexion whatever with the *London* and *Westminster Bank*, except that the *London* and *Westminster Bank* act as the *London* agents of the *St. Albans Bank*. On the 21st of *February*, 1835, one *W. J. Robertson* applied at the office of the said Bank of *St. Albans*, for a bill of exchange on *London* for 25*l.*, and paid *Henry Edwards*, the clerk of the said *George Alfred Muskett*, the sum of 25*l.* for the same; and thereupon the said *George Alfred Muskett*, by the said *Henry Edwards*, his clerk, drew upon the said *London* and *Westminster Bank* a bill of exchange, and delivered the same to the said *W. J. Robertson*. The following is a copy of the said bill:—

"No. 383, Bank of *St. Albans*, post-bill, 21st *February*, 1835.—To the *London* and *Westminster Bank*, *Throgmorton Street*, twenty-one days after date, pay to the order of *W. J. Robertson, Esq.*, the sum of 25*l.*, and place the same to account.

"25*l.*

"For the Bank of *St. Albans*,

"Entd. H. E."

"HENRY EDWARDS."

The said sum of 25*l.* was received by the said *George Alfred Muskett*, on his own sole account, and for his own use and advantage. The *London* and *Westminster Bank* did not pay or compound for the stamp-duty on such bill; but the stamp-duty on such bill was paid or compounded for by the said *George Alfred Muskett*. The said bill was, on the 23rd *February*, 1835, presented to the said *London* and *Westminster Bank* for acceptance, and the same was accepted by order of the directors thereof, as follows:—"Accepted at 38, *Throgmorton Street*, per procuration of the trustees of the *London* and *Westminster Bank*.

"J. W. GILBERT, Manager."

At the date of the presentment of the said bill for acceptance, the said *London* and *Westminster Bank* had, as such *London* bankers of the said *George Alfred Muskett*, as aforesaid, monies in their hands to an amount exceeding 25*l.*; and the said bill was accepted for and on account of the said *London* and *Westminster Bank*. The question for the opinion of the Court was, whether the acceptance by the said *London* and *Westminster Bank* of the said bill was lawful, having regard to the provisions of the act 3 & 4 Will. 4, c. 98, and other acts passed and now in force, respecting the Bank of *England*.

The case was argued this term by *Maule*, for the plaintiffs, and the *Attorney-General*, for the defendants. The various statutes relating to the privileges of the Bank of *England* are fully set forth in the judgment.

*Cur. adv. vult.*

TINDAL, C. J.—The case which has been sent to us by the master of the rolls, involves in its determination results of such general importance, that we



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have thought it right not merely to certify our opinions to his honour in the ordinary way, but to state publicly the grounds and reasons on which such opinions have been formed. The question is, whether a co-partnership, consisting of more than six persons, and carrying on the trade or business of bankers within the distance of sixty-five miles from *London*, can by law, in the course of such trade or business as bankers, accept a bill of exchange payable at less than six months from the time of the giving of such acceptance? And we are of opinion, regard being had to the various statutes which relate to the *Bank of England*, that such an acceptance is not a lawful acceptance. In thus stating the question, we purposely insert, as one of its terms, that the acceptance is given in the course of the defendant's trade or business of bankers; first, because such appears to us to be the necessary character of the transaction described in the case; and, secondly, because we are unwilling to embarrass the general question, with the consideration of one of much less importance, viz., whether an acceptance given by more than six persons, in partnership, but not as bankers, or by more than six persons in partnership as bankers, but given in payment of their private debt, as for goods sold or salaries of clerks, or rent, or the like, would or would not fall within the restriction to which we shall afterwards more particularly advert, and which we consider under the several statutes to be still in force. The question above stated depends for its answer upon the construction to be put upon the stat. 3 & 4 Will. 4, c. 98, the statute which is at present in force and operation; and the particular clause of the statute which bears upon it, is sec. 3, by which it is enacted, "that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in *London*, or within sixty-five miles thereof, provided that such body politic or corporate, or society, or company, or partnership, do not borrow, owe, or take up, in *England*, any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof." These prohibiting words are found originally in the 9th sec. of the stat. 6 Ann. c. 22; by which statute any direct restriction was for the first time imposed upon the rights of the public, in favour of the *Bank of England*: and, in order to determine the proper construction which is to be put on the words employed by the legislature, in the statute of his present majesty, it will be advisable to ascertain, in the first place, the intention of the legislature when the same restriction was originally imposed; and afterwards to consider, whether any of the subsequent statutes passed from time to time, for the renewal or confirmation of the privileges of the *Bank of England*, either throw any light upon the original intention of the legislature, as to the extent of the restriction, or have, by their own operation, enlarged such extent. The *Bank of England* was first established by the 5 & 6 Will. & Mary, c. 20, which, by sec. 19, gave power to their majesties, by letters patent, to incorporate the subscribers and contributors to the sum of money therein mentioned, by the name of the Governor and Company of the *Bank of England*. By two subsequent sections, the 26th and 27th, the corporation is prohibited from buying or selling any goods, wares, or merchandizes, but not from dealing in bills of exchange, or in buying or selling bullion, gold, or silver, or goods deposited with them. This statute, however, does not confer any exclusive privilege whatever on the bank, beyond that given by the 28th sec., namely, that of making their bills obligatory, and of credit under the seal of the corpora-

tion, transferable *toties quoties* by indorsement under the hand of the holder, and allowing the assignee to sue upon the same in his own name; but the statute itself is altogether silent as to the intention of the legislature, whether the bank thereby empowered to be created should be a bank of circulation and issue, or merely a bank of deposit. Under the powers of this statute the governor and company of the Bank of *England*, were shortly afterwards made a body corporate by royal charter; and by the stat. 8 and 9 Will. 3, c. 20, which is the next in succession, relating to the Bank, the stock of the company is allowed to be augmented and increased, and the first direct privilege is conferred upon the company, by enacting, in sec. 28, that during the continuance of the corporation, "no other bank, or any other corporation, society, fellowship, company, or constitution, in the nature of a bank, shall be erected or established, permitted, suffered, countenanced, or allowed, by act of parliament, within this kingdom," which words are explained by the later stat. 15 Geo. 2, c. 13, sec. 5, to intend "that no other bank shall be erected, established, or allowed, by parliament." From this time no extension whatever of the privileges of the Bank took place, until the passing of the stat. 6 Anne, c. 22, above referred to, when, in an act of parliament, the title to which embraces a variety of subjects of legislation having no relation to each other, and states, amongst the rest, that of "An Act for securing the credit of the Bank of *England*"; the prohibition above referred to, upon the proper construction of which the present inquiry mainly turns, is first created by the legislature. In the interval, however, between the incorporation of the Bank of *England* and the stat. of Anne, that is, between the years 1694 and 1707, it is certain that the Bank had begun and continued to act as a bank of circulation and issue, and probably to a very considerable extent. This appears evident, as well from the language of the recital in the 36th section of the stat. 8 & 9 Will. 3, c. 20, above referred to, as from the enacting words of that section. The 36th section recites "that divers frauds and cheats had been put upon the governor and company of the Bank of *England*, by the altering, forging, and counterfeiting of the bank bills and bank notes of the said governor and company, and by the rasing and altering indorsements thereupon, to the great decay of credit"; after which the clause then proceeds, "that for redressing the same for the future, it is enacted that the forging and counterfeiting the common seal of the corporation of the governor and company, or of any sealed *bank bill*, made or given out in the name of the said governor and company, for the payment of any sum of money, or of any bank note of any sort whatsoever, signed for the said governor and company of the Bank of *England*, or the altering or rasing any indorsement on any bank bill or note of any sort, shall be and is hereby adjudged to be felony without benefit of clergy." This clause affords an inference which seems undeniable, namely, that in 1697, when that stat. was passed, the Bank of *England* was in the habit of issuing bank bills sealed, and bank notes signed, so largely, that the protection of such bills and notes from forgery was essential to the preservation and security of the public credit. In this state of things, the stat. of Anne was passed. The clause in question begins by reciting the enactments of the before-mentioned stat. 8 & 9 Will. 3, c. 20, by which it was provided that during the continuance of the corporation of the governor and company of the Bank of *England*, no other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank, shall be erected or established,

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permitted, suffered, countenanced, or allowed by act of parliament within the kingdom; nevertheless, that since the passing of the said act, some corporations, by colour of the charters to them granted, and other great numbers of persons, by pretence of deeds or covenants, united together, have presumed to borrow great sums of money, and therewith, contrary to the intent of the said act, do deal as a bank, to the apparent danger of the established credit of the kingdom; and after this recital, the stat. proceeds to provide the remedy in the terms following, viz., "that it shall not be lawful for any body politic or corporate whatsoever, erected, or to be erected, other than the said governor and company of the Bank of *England*, or for other persons whatsoever, united or to be united in covenants or partnerships, exceeding the number of six persons, in that part of *Great Britain* called *England*, to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand, or at any less time than six months from the borrowing thereof." The great grievance, therefore, to which the stat. of Anne intended to apply a remedy, was that of other corporations and large numbers of persons united in partnership, contrary to the intent of the stat. of William 3, "presuming to deal as a bank," that is, as a bank of circulation and issue; for merely dealing as a bank of deposit, could scarcely "affect the credit of the Bank of *England*," the securing of which credit is the object mentioned in the title of the act; still less could it operate "to the danger of the established credit of the kingdom," which is the effect of such dealing, as described in the recital to the said section. Such, then, being the grievance felt and described in the statute, the remedy which the legislature would *a priori* be expected to apply, is some remedy co-extensive with the mischief itself; some enactment, which, if it did not in terms prevent persons united in a co-partnership of more than a given number, from "dealing as a bank of circulation altogether," would at least impose such restraints and regulations upon the mode of dealing as a bank, as would prevent them from coming into competition with the dealing of the Bank of *England*, by laying a sufficient check upon the issue of negotiable bills or notes, having the security of a large body of co-partners, and made payable on demand, or at a very short time after their issue. Whatever was the extent of the restriction thus originally imposed by the statute of Anne, it is found to be repeated in all the subsequent statutes passed from time to time, for the renewal or confirmation of the privileges of the Bank of *England*; if not in words precisely the same to the very letter, yet in words bearing precisely the same meaning; and it is for the last time inserted in the statute above referred to, the 3 & 4 W. 4, c. 98, as the proviso or condition upon the observance of which "any society or partnership, although consisting of more than six persons, might carry on the trade or business of banking in *London*, or within sixty-five miles thereof." And the question immediately before us is, whether this restriction is framed in such terms as to comprise within its limits and extent the transaction stated in the case? Upon the part of the defendant it is contended, that the facts stated in the case do not bring the transaction within the restriction of the statutes. And as the three principal objections which have been urged are grounded upon the language used in the statute of Anne, we will consider them in their order. In the first place, it is objected that the statute of Anne using the term "bills," simply and without any addition, must be construed to intend "bills sealed or obligatory," or, as they are commonly termed, single bills; and that by reference to the two former acts,

passed in the preceding reign for the establishment of the Bank of *England*, bills of exchange cannot be held to be included within the word "bills," without any addition. In the second place, it is objected that no case can fall within the meaning of the restriction, unless where the transaction is such as to import "a borrowing" on the part of the co-partnership, which, as it is argued, cannot be said to exist on the present occasion. And, thirdly, it is objected that even if the defendants can be held to have "borrowed" by accepting the bill, yet that they have not borrowed "on their bill," which is required by the statute. With respect to each of these objections, it may be advisable, in order to discover the views of the legislature, to consider, first, the statute of Anne taken by itself, and next, some of the subsequent acts passed in *pari materid*, in order to discover whether they throw any light upon the language originally employed in the first statute, or make any legislative alteration therein by subsequent enactment. And, with respect to the first objection, we think there must be considerable doubt as to the soundness of the construction contended for by the defendants, when it is observed that the statute of Anne is not speaking, in the clause under consideration, of bills or notes of the governor and company of the Bank of *England*, but of bills or notes of any other bodies politic or corporate, and of persons united in co-partnership to a greater number than six. It is, therefore, no necessary inference, that by "bills," the statute meant such bills only as the Bank of *England* were in the habit of issuing, but all other bills might equally be included. But, again, the restriction relates to bills of persons in co-partnership; but, as such persons can have no common seal, it would seem, to say the least of it, very improbable that the statute could have intended bills sealed with the several seals of a co-partnership, consisting of persons exceeding the number of six, to an indefinite extent; sealed bills by an indefinite number of private partners never having been heard of in the course of trade—certainly never as a medium of circulation; the very necessity of proof of so many separate sealings, (the law of *England* not allowing any one partner to seal for others under an implied authority,) rendering the recovery on such instruments almost impracticable. Again, neither the bills sealed by other bodies corporate or by co-partners were negotiable instruments, not being transferable by indorsement under the hand of the holder, the power given for transferring such sealed bills by indorsement being limited by the statute to the case of sealed bills of the Bank of *England*. To construe the restriction, therefore, as limited to sealed bills of co-partners would be to legislate against a danger which could not, by possibility, exist. Again, the manifest object of the restriction was, to prevent the circulation of negotiable paper, of whatever description it might be, which might come into competition with circulating paper of the Bank of *England*. To prohibit, therefore, the issue of such bills only as corresponded in precise form with those adopted by the Bank, and to permit the issue of bills of any other form, would have fallen short altogether of the object professed by the restriction; it would have conferred no advantage whatever on the Bank, nor any security to public credit. We therefore think, looking at the statute of Anne alone, the sounder construction is, that, in using the general expression, "bills or notes," it was the object of the legislature to comprise within the restriction, all negotiable instruments which could fall, in common understanding at that time, within either of those denominations. And again, when it is further considered, that, within three years before the passing of the statute of

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Anne, promissory notes and inland bills of exchange had been put by the legislature upon the same footing, we think the expression of bills and notes may, with more propriety of construction, be held to comprise bills of exchange, than be confined to bills under seal. But, in order to arrive at the meaning of the prohibition in the present statute, (3 & 4 W. 4.) which is borrowed from the statute 6 Anne, the acts passed by the legislature, *in pari materia* between the two, may be referred to with great advantage. The question is, whether the expression "bills or notes," found in both those acts, is confined to bills sealed and promissory notes. The affirmative of that proposition is contended for by the defendants, on the ground of the language employed by the legislature in the two earliest Bank Acts. Do the subsequent acts bear out or impugn that construction? The statute which appears to us to throw the greatest light on the question, is the 15 G. 2, c. 13. The 5th section of that act, which recites that it is passed "to prevent any doubts that may arise concerning the privilege or power given by former acts, to the governor and company of exclusive banking, and also in regard to the erecting any other bank or banks by parliament, or restraining other persons from banking during the continuance of the said privilege," then proceeds to declare, that it is the true intent and meaning of this act, "that no other bank shall be erected, established, or allowed by parliament, and that it shall not be lawful for any body politic, &c.," to borrow, owe, or take up any sum or sums of money on "their bills or notes," payable, &c., as stated in the statute of Anne. Now, in the 12th section of the very same statute, the word "bill" requires manifestly the construction of a bill, not under the seal of the company, but an ordinary bill of exchange. It is an enactment, that, "if any officer or servant of the company intrusted with any note, bill, dividend warrants, bond, deed, or any security, money, or other effects belonging to the said company, shall embezzle any such note, bill, dividend warrant, bond, deed," &c., such person shall be guilty of felony. It appears to us, that the words note and bill, when occurring without any addition, in the 12th section, must be held to mean, not bills sealed only, but bills of exchange; and, if so, the same expression, "bills or notes," occurring in the 5th section, which is expressly stated to have been passed to prevent any doubts as to the privileges given by former acts, must receive the same construction. The statute next in order of time, to which reference may be made for the purpose before adverted to, is that of 7 Geo. 4. c. 46. By that statute it is recited, that the Bank of *England* had consented to relinquish so much of their exclusive privilege of banking, as prohibits more than six persons in *England*, acting in co-partnership, from borrowing, owing, &c., at a greater distance than sixty-five miles from *London*, upon certain conditions therein specified. One of these conditions is stated, in section 3, to be this, that such co-partnerships do not borrow, owe, or take up, in *London*, or within sixty-five miles thereof, any sum of money on any bill or promissory note of any such co-partnership, payable on demand, or at any less time than six months from the borrowing thereof, "nor make or issue any bill or bills of exchange or promissory note of such co-partnership, contrary to the provision of the recited act of the 39 & 40 G. 3." These last words plainly shew, that bills of exchange are within some of the provisions of 39 & 40 G. 3. But upon reference to that statute, no words are found to comprehend them except the expression so often adverted to, "bills or notes." The very same section further provides, that it shall not extend to prevent such co-partnership

(that is, a co-partnership carrying on their business as bankers beyond sixty-five miles from *London*;) by any agent from discounting in *London* "any bill of exchange not drawn by or upon such co-partnership, or by or upon any person in their behalf." Now the manifest object of the introduction of this negative was, to let it appear clearly to the world that the circulation in *London* of bills of exchange, at short dates, upon the credit of such country co-partnerships, either as drawers or acceptors, was excluded from the benefit of the proviso. And the anxiety upon this subject is further manifested by the provision contained in the 2nd section, that such country co-partnerships shall not draw upon any person resident in *London*, any bill of exchange which shall be payable on demand, or for less than 60*l*. With such an object in view, it can scarcely be conceived to be within the intention of the legislature, that a bill of exchange at twenty-one days for 25*l*., as is the present case, or as it might be, at three days for 5*l*., (for the argument is precisely the same,) might be accepted by a banking co-partnership in *London*, and circulated in *London* upon their credit, without any violation of the prohibition in the same statute to owe money on such bill. Lastly, to take into consideration the recent statute 3 & 4 W. 4, the 3rd section of that statute, after reciting the intention of the act to be, that the governor and company of the Bank of *England* should, during the period stated in that act, (subject, nevertheless, to such redemption as was described therein,) continue to hold and enjoy all the exclusive privileges of banking given by the said recited act of the 39 & 40 G. 3, as regulated by the said recited act of the 7 G. 4, or any prior or subsequent act or acts of parliament, but no other or further exclusive privilege of banking; and that doubts had arisen as to the construction of the said acts, and as to the extent of such exclusive privilege, and it was expedient that the same should be removed: it was, therefore, declared and enacted, that any body politic or corporate, or society or company or partnership, although consisting of more than six persons, might carry on the trade or business of banking in *London*, or within sixty-five miles thereof; provided that such body politic, &c., do not borrow, owe, or take up in *England*, any sum or sums of money on their bills or notes, payable on demand or at any less time than six months from the borrowing thereof. Here is a modern act of parliament, in which the expression of "bills or notes" is found to occur. Suppose this statute had stood alone, could any one, at this time of day, hesitate in construing it, to intend bills of exchange and promissory notes. And when we find the expression in the section which recites that doubts had arisen as to the construction of the former acts, and as to the extent of the exclusive privilege, we think it amounts to a legislative declaration, that the words in the former statutes, are to be construed in the sense which the same words import at the time when the new statute speaks. But the second objection, grounded upon the words of the original statute, and upon which the principal reliance appears to have been placed in the course of the argument, is, that the transaction stated in the case cannot be held to be "a borrowing"; that the acceptance by a banker of a bill drawn upon him by his customer, at a distant day, for the payment of his, the customer's, money placed in the banker's hands, is no loan to the banker, and consequently no borrowing by him, but merely a mode of payment to the customer of what is his own. But it appears to us, in the first place, that the acceptance of the bill under the circumstances stated in the case, is to be considered as a borrowing in point of law. By taking the acceptance, the

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customer consents that his money shall remain in his banker's hands until the bill becomes due; he has no power or right, after receiving the acceptance, to change his mind, cancel the acceptance, and compel the banker to pay his money on demand. The drawing and accepting the bill forms a contract between the drawer and acceptor, which can only be rescinded by the mutual consent of both; for what would be the condition of the banker, who may have lent the money of his customer on the faith of the forbearance given, if the law were otherwise? The relative position, therefore, of the customer and the banker seem undistinguishable as to its legal consequences, in any material respect, from that of lender and borrower. But "borrow" is not the only word employed by the statute; the words used are, "provided they do not borrow, owe, or take up." Now we consider these latter words as put in apposition with the word borrow, for the purpose of expounding the meaning in which the legislature intended to employ the first term. For, if "owe" and "take up" had been used in a sense essentially different from "borrow," the frame of the proviso must be held to be incomplete. There is, upon that supposition, no length of time expressed in the statute from "the owing or taking up," short of which time the bill or note cannot legally be drawn: for the proviso prohibits such bills or notes only as are payable on demand, or at a less time than six months "from the borrowing thereof." The meaning of the term "borrow," must, therefore, be taken to have been considered by the legislature as substantially the same as that of the terms "owe or take up," with which it is put in juxta position. And that the transaction amounts to "an owing" of money by the banker to his customer, can admit of no doubt; whenever the drawee of a bill of exchange accepts it, he becomes a debtor to the holder of the bill, to the amount of the sum specified in the bill, and the holder gives credit to the acceptor to that amount until the maturity of the bill. The relation of debtor and creditor thus created by acceptance of the bill, appears to be considered by the legislature, as equivalent to an actual borrowing of the money owed on the one hand, and credited on the other. That such was the opinion of the Court of King's Bench, appears from the case of *Broughton v. Manchester Water Works Company* (a), which was much referred to in the course of the argument; in giving judgment on which case, each of the learned judges states in effect, "that the acceptance made the company debtors, and to owe upon their bills." It was objected in the third place, that even, if there was a borrowing by the defendants, yet they have not borrowed "on their bills," and that the stat. prohibits only a borrowing on their "bills or notes." But we are of opinion, that if the bankers are to be held borrowers, and the acceptance of the bill drawn upon them is the security they give for the debt, they do in common parlance borrow on their bills when they borrow on their acceptances. The acceptor is as much a party to the bill as the drawer; indeed, he is the person primarily liable on the bill as soon as he becomes a party to it by giving his acceptance. But, after all, the expression both in the statute of Anne, and the subsequent acts "of their bills or notes," may only have been used to distinguish them from the bills or notes of the Bank of England; and, if the interpretation of the statute could be held otherwise, what an easy mode would be opened for evading the prohibition of the statute. It was insisted upon, in the course of the argument, that the holding the acceptance stated in the case, to be illegal, would invalidate the security of all

transactions in bills of exchange, where the acceptors consisted of a partnership of more than six persons; for that no man could tell, by looking at the bill, at what period the time of borrowing took place, or whether the bill had six months to run from such time or not. The first answer to this objection is, that the difficulty does not occur in the present, or in any case, where the bill is drawn at less than six months from its date; for in such case, every person must know, that the bill had been accepted within six months from the borrowing. Secondly, that although, if a bill should be drawn at a longer period than six months, and accepted within six months, next before the time of its maturity, the transaction would be a violation of the provisions of the statute; and all persons who were privy to it, would be prevented from enforcing the acceptance; still, such violation of the prohibition of the statute, would not affect a *bond fide* holder without notice. If bills of exchange so accepted, cannot lawfully be issued, the danger of their being employed as circulating paper cannot be great; but, on the other hand, if bills at very short dates may be lawfully accepted, it is obvious that a paper circulation might be created by such bills, almost equivalent to a circulation of promissory notes payable on demand. Notwithstanding, therefore, the objections which have been urged on the part of the defendants, to the construction of the clauses above adverted to, we are of opinion, that the acceptance stated in the case, falls within the prohibition contained in the statute of William 4; and we feel no doubt, that it falls within the mischief which the statute of Anne, and all the subsequent acts intended to provide against, viz.—the permitting any other body corporate, or any partnership consisting of a large number of persons, to enter into competition with the Bank of *England*, by the issue of notes or bills, either payable on demand or at short periods from their issue. This construction of the prohibitory clause, gives a real benefit and protection to the Bank of *England*; and that something real and substantial was intended to be given by the legislature on the one hand, and was on the other hand, thought and believed by the Bank of *England* to be given to them, is evident from the constant repetition in all subsequent acts in the same words, of the identical provision, contained in the statute of Anne; for, if not a real privilege, why was it continued to be inserted? The construction contended for by the defendants, that it must be confined to bills under the seals of the co-partners, gives in reality no benefit or protection at all at the present period, if it ever could have given any. But it is not only to be considered, that such was the sense in which Parliament and the Bank of *England*, who may be considered as the contracting parties, understood the provision; but such also, has been the general understanding of all at the time the first act passed, and from thence to the stat. of W. 4. For no instance can be pointed out, until the present, in which a banking co-partnership consisting of more than six in number, have been found in the course of their dealing as bankers, to accept bills of exchange payable at a less interval than six months from their acceptance. And if no other argument was brought forward, we attribute great weight to the maxim of law, *contemporanea expositio fortissima est in lege*. Upon the whole, therefore, we shall certify to the master of the rolls the opinion of the judges who heard the argument to the effect above stated. The following certificate was subsequently sent to the master of the rolls:—

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“We have heard this case argued by counsel, and are of opinion that the acceptance by the *London and Westminster Bank* of the bill mentioned in the



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case, was not lawful, regard being had to the provisions of the act 3 & 4 W. 4, c. 98, and the other acts passed and now in force respecting the Bank of England.

"N. C. TINDAL,

"S. GASELER,

"J. VAUGHAN,

"J. B. BOSANQUET."

Nov. 25.

## DUNNAGE v. KEMBLE and others.

In trespass for breaking a house, the defendant pleaded not guilty, and an entry to make a distress. A verdict was found for the plaintiff on the first issue, damages one farthing; and for the defendant on the second issue:—  
*Held*, that the plaintiff was not entitled to costs, unless the judge certified under 22 & 23 Car. 2, c. 9.

**TRESPASS** for breaking and entering the dwelling-house of the plaintiff and seizing the goods therein. *Pleas*—first, not guilty; secondly, as to breaking open the door of the house, that the plaintiff was weekly tenant to the defendant *Kemble*; and that rent being in arrear, and the outer door open, the defendants entered and distrained the plaintiff's goods. The plaintiff joined issue on the first plea, and replied *de injuria* to the second plea. At the trial, before *Vaughan*, J., the jury found a verdict for the plaintiff, with one farthing damages on the first issue, and for the defendant on the second issue. The learned judge did not certify as to costs, and the prothonotary not having taxed any costs to the plaintiff,

*Andrews*, Serjt., obtained a rule *nisi* to review the taxation. He contended that the plaintiff was entitled to his full costs. *Hughes v. Hughes* (a), *Smith v. Edwards* (b).

*Talfourd*, Serjt. shewed cause.—In *Hughes v. Hughes* (a) it was held, that in trespass to land, a verdict, though under 40s., on a plea of not guilty, entitles a plaintiff to full costs, without a certificate under 22 & 23 Car. 2, c. 9. *Smith v. Edwards* (b), is to the same effect. But these cases were decided under a misapprehension that, since the new rules of pleading, the title to the land could not come in issue, under the plea of not guilty. But that is not so, because there are many cases where the title may come in question under this plea (c). As under the 11 Geo. 2, c. 19, s. 21, which enacts, "that in all actions of trespass, or upon the case, to be brought against any person or persons, entitled to rents or services of any kind, his, her, or their bailiff or receiver, or other person or persons, relating to any entry by virtue of this act or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods or chattels thereupon, it shall and may be lawful to and for the defendant or defendants in such actions, to plead the general issue, and give the special matter in evidence, any law or usage to the contrary notwithstanding." So under sec. 44 of the Bankrupt Act, 6 Geo. 4, c. 16; sec. 109 of the Highway Act, 5 & 6 W. 4, c. 50; and other statutes. The stat. 3 & 4 W. 4, c. 42, sec. 1, which authorized the judges to make the new rules of pleading, provides "that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence in any case, wherein he is now or

(a) 2 Cr. M. &amp; R. 663; 1 Gale, 302.

(b) 4 Dow. P. C. 621; 1 Har. &amp; Wol. 497.

(c) See note (b) in *Hughes v. Hughes*, 1 Gale, 302.

hereafter shall be entitled to do so, by virtue of any act of parliament now or hereafter to be in force." Therefore, as the title might have been in issue, and as the judge has not certified that it did come in question, the plaintiff is not entitled to more costs than damages, and the decision of the prothonotary was correct.

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*Andrews*, Serjt. and *Bompas*, Serjt., in support of the rule, relied upon *Hughes v. Hughes* (c), and *Smith v. Edwards* (d).

TINDAL, C. J.—The argument now urged against this rule, does not appear to have been raised in the former decisions: as the question is of some importance, we will take time to consider it.

*Cur. adv. vult.*

The Court subsequently came to the following decision:—

"The Court have considered this case, and are of opinion that the plaintiff is not entitled to costs without a certificate under the statute Car. 2; and, therefore, the rule for directing the prothonotary to tax his costs must be discharged, but without costs."

Rule discharged.

(c) 2 Cr. M. & Ros. 663; 1 Gale, 302.

(d) 4 Dow. P. C. 621; 1 Har. & Wol. 497.

## REGULÆ GENERALES.

"WHEREAS, by the statute 5 & 6 William 4, chapter 82, it is enacted, 'That from and after the 31st day of *December*, 1835, the several offices in his majesty's Court of Common Pleas thereafter mentioned, viz.—the Chirographer, and the Secondary, Register, and Clerks of Counties in the office of the Chirographer; of the Clerk of the King's Silver, and of the Clerk of the Return Office and of the Inrolment of Writs for Fines and Recoveries; and also, the several offices in the Alienation Office, consisting of two Commissioners, a Receiver-General, two entering Clerks, a Master in Chancery appointed for taking affidavits, and an office-keeper, be abolished.'

"And whereas, by the said act, it is further enacted, 'That the several records, books, and other documents of and concerning the duties and business of the said offices so abolished as aforesaid, shall, on or before the said 31st day of *December*, be delivered by the several officers or persons now having custody of the same, into the hands and possession of the officer of the Court of Common Pleas, at *Westminster*, for the time being, appointed or to be appointed by the Lord Chief Justice of the Court of Common Pleas, for the purpose of examining, filing, and recording, all certificates of the taking of acknowledgments by married women of deeds, under the provisions of the statute 3 & 4 William 4, chapter 74, intitled "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of assurance," to be by him kept and preserved; subject, nevertheless, to such rules,

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orders, and regulations as the Court of Common Pleas shall or may from time to time make or ordain in respect of the same.'

"And whereas, Mr. *Thomas Sherwood* is the officer of the said Court of Common Pleas for the time being, who has been appointed under and by virtue of the said act of 3 & 4 William 4th., chapter 74.

"It is ordered, that the said several officers hereinbefore mentioned, whose offices have been so abolished, and any other persons now having custody of all or any of the records, books, and other documents, of and concerning the duties and business of the said several offices so abolished as aforesaid, do forthwith deliver up to the said *Thomas Sherwood*, all such records, books, and other documents, to be by him kept and preserved, subject to such further order, rules, and regulations, as the said Court of Common Pleas shall hereafter make or ordain in respect of the same.

"N. C. TINDAL,

"S. GASELEE,

"J. VAUGHAN,

"J. B. BOSANQUET."

Read in Court, 25th November, 1836.

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[MICHAELMAS TERM, 7TH WILLIAM 4TH, 1836.]

"It is ordered that from and after the the last day of this term, all rules upon sheriffs, other than the sheriffs of *London* and *Middlesex*, to return writs either of mesne or final process, and rules to bring in the bodies of defendants, be eight day rules instead of six day rules."

(Signed by all the Judges.)

END OF MICHAELMAS TERM.

A  
D I G E S T  
OF THE  
CASES REPORTED IN THIS VOLUME;

CONTAINING

THE DECISIONS OF THE COURT OF COMMON PLEAS

FROM

EASTER TERM, 1836, TO MICHAELMAS TERM, 1836, INCLUSIVE.

ACKNOWLEDGMENT.

1. The commissioners for taking acknowledgments under 3 & 4 W. 4, c. 74, have a lien for their fees on the documents perfected before them; but one commissioner cannot set up the lien of the other without being duly authorized to do so. *Ex parte Grove*, 246.

2. The affidavit verifying the certificate of the due taking of the acknowledgment of a married woman, under 3 & 4 W. 4, c. 74, may be made by one of the commissioners, although he be the attorney in the transaction. *Re Scholefield*, 236.

ACTION.

See ATTORNEY, 4.

1. The declaration stated that the plaintiffs, who were proprietors of a newspaper, at the solicitation and request of the defendant, published a certain statement in their newspaper; that one *Charmers* afterwards commenced an action against them for a libel contained in the publication; and that the defendant, in consideration of the premises, and that the plaintiffs would defend the action, undertook to save the plaintiffs harmless, and indemnify them from all payments, damages, costs, charges, and expenses, which they might incur, sustain, or be liable for, by reason of their so as aforesaid publishing the said statement, and of their defending the said action:—*Held*, in an action brought on this indemnity, 1st, that the consideration was entire, and that the part of it which consisted of the publication of a libel being illegal, the whole of it was tainted with illegality, and that the action could not be supported. 2ndly, that if the former part of the consideration was rejected as surplusage, the promise was then void as amounting to maintenance. *Semble*, also, that

the promise was void as being too large. *Shackell v. Rosier*, 17.

2. In an action against the commissioners of sewers, the declaration alleged that they unskillfully, wrongfully, and improperly cut a sewer near to an ancient messuage of the plaintiffs, so that it was injured and weakened; and the cause being referred at nisi prius, the arbitrator found in his award, that there were two modes of making a sewer, the one by tunnelling, the other by open cutting; that a deep sewer could not be made in the street where the plaintiff's house was, by either method, without risk of doing damage to the buildings. That the sewer in question was made by tunnelling; but that the probability of damage accruing was in some degree less where it was made by open cutting. That the commissioners, in causing the sewer to be made, were acting *bona fide*, and that the sewer was fit and proper for convenient drainage, and was made in a skillful and proper manner in all respects:—*Held*, that upon this state of facts the commissioners were not liable to pay damages for the injury caused to the messuage. *Grocers' Company v. Donne*, 120.

AGREEMENT.

See ARBITRATION, 4. CONTRACT, 3, 4, 5, 6.  
FRAUDS, STATUTE OF, 1, 2. PLEADING, 17.

APOTHECARY.

See CONTRACT, 6.

ARBITRATION.

See ACTION, 2. COSTS, 1. EVIDENCE, 2.

1. A judge is not empowered, under 3 & 4 W. 4, c. 42, s. 39, to order a submission to arbitration to be revoked, upon an *ex parte* application. *Clarke v. Stocken*, 1.

upon the ground that no apprenticeship for five years was required for the business of a surgeon, and that the defendant could not object to the legality of his own bond; but the Court refused to grant a rule:—*Held* also, that the plaintiffs were not entitled to be relieved from payment of costs under 3 & 4 W. 4, c. 42, s. 31. *Prole v. Wiggins*, 204.

### COPYHOLD.

The admission of a tenant for life to copyhold lands is the admission of the remainder-man, and the lord of the manor is not entitled to a fine against the remainder-man, unless by virtue of a custom within the manor. *Phypers v. Eburn*, 230.

### COSTS.

See INTERPLEADER, 1. PARLIAMENTARY LAW, 4, 5. PRACTICE, 10, 15.

1. An action of ejectment was referred by an order at nisi prius, and the arbitrator was empowered to award the defendant a compensation for buildings erected on the premises. The arbitrator ordered a verdict to be entered for the plaintiff, and awarded the defendant a sum of money for the buildings:—*Held*, that this sum of money might be set off by the plaintiff against the costs which the defendant was liable to pay him, but that it was subject, under Reg. 93 H. T. 2 Will. 4, to the defendant's attorney's lien for his costs. *Doe d. Swinston v. Sinclair*, 111.

2. Where less than 20*l.* was awarded to the plaintiff, on a writ of inquiry in an action of covenant, and the prothonotary taxes the costs, according to the lower scale, promulgated March 15, 1834, the Court refused to interfere with the taxation. *Hoppel v. Leigh*, 107.

3. Where a *grand cape* was set aside for irregularity, the Court refused to make the rule absolute with costs. *Foot v. Sheriff*, 108.

4. Section 50 of the Insolvent Debtors' Act, (7 G. 4, c. 57,) provides that the discharge of a prisoner shall extend to all process and costs for contempt, and to all costs incurred by a creditor in any action or suit brought for the recovery of any debt or damages:—*Held*, that this was applicable to the costs of an action of trover, in which the verdict was obtained before, and the costs were taxed after the filing of the insolvent's petition. *Goldsmid v. Lewis*, 142.

5. Where an action was brought in *Surrey*, on a bill of exchange, and the prothonotary taxed the plaintiff's costs as if the *venue* had been laid in *London*, where the attorney and witnesses resided; it was *held* that the taxation was incorrect, and that the plaintiff was entitled to the costs of trying the cause in *Surrey*. *Vere v. Moore*, 200.

6. In an action for assault, battery, and false imprisonment of the plaintiff's wife, the defendant pleaded, first, not guilty; secondly, that the party was not the plaintiff's wife; thirdly, a justification. A verdict was found for the plaintiff, with one farthing damages on the two first issues, and for the defendant on the third:—*Held*, that the judge was authorized to give a certificate to deprive the plaintiff of his costs, under 43 Eliz. c. 6. *Wilson v. Lainson*, 249.

7. Where a defendant pleads various pleas, to parts of the sum mentioned in the declaration, and also pays money into court, and the plaintiff enters a *nolle prosequi*, as to the pleas of payment, the defendant is entitled to his costs, under sec. 33, 3 & 4 W. 4, c. 42. Where various defences are pleaded to one demand, and the plaintiff enters a *nolle prosequi*, he is liable to the costs of all the pleas. *Williams v. Sharwood*, 248.

8. In an action on a bond by the administrators of the obligee, it was pleaded that the bond was given in pursuance of a corrupt agreement that the obligee should take the son of the obligor as his apprentice, to learn the profession of surgeon, apothecary, and man-midwife, for two years only; but that in certain articles of agreement, it should be made to appear that the apprentice was articulated for five years, in order that by such corrupt contrivance the parties might fraudulently and illegally procure the apprentice to be admitted for the purpose of practising as an apothecary upon serving two years instead of five years, as required by the statute. After verdict it was moved to enter judgment for the plaintiff *non obstante veredicto*, upon the ground that no apprenticeship for five years was required for the business of a surgeon, and that the defendant could not object to the legality of his own bond; but the Court refused to grant a rule:—*Held* also, that the plaintiffs were not entitled to be relieved from payment of costs under 3 & 4 W. 4, c. 42, s. 31. *Prole v. Wiggins*, 204.

9. In trespass for breaking a house, the defendant pleaded not guilty, and an entry to make a distress; a verdict was found for the plaintiff on the first issue, damages one farthing; and for the defendant on the second issue:—*Held*, that the plaintiff was not entitled to costs, unless the judge certified under 22 & 23 Car. 2, c. 9. *Dunnage v. Kemble*, 304.

10. Where one attorney brought an action against another attorney for his bills of costs for agency business:—*Held*, that the bill was not taxable. *Weymouth v. Knipe*, 280.

### COVENANT.

See LANDLORD AND TENANT, 2. LIMITATIONS, STATUTE OF, 2, 3. PLEADING, 17.

## CUSTOM.

See COPYHOLD, 1.

In trover, the defendant justified the holding of certain bales of wool, under an ancient custom used in the trade of public warehouse-keepers in London, for a general lien upon all goods housed in their warehouses for or in the name of the merchants or other persons by whom such warehouse-keepers were retained, for all monies, or any balance thereof, due from such merchants or other persons to such warehouse-keepers for or on account of any advances or expenses which such warehouse-keepers had made, or had been put to, in paying the duties and customs by law imposed and charged on goods consigned to such merchants and other persons from abroad; and in paying the freight and other charges, and the advances, charges, and claims which the warehouse-keepers should have made, or have been put to, for entering, landing, and warehousing the said goods:—*Held*, upon motion after verdict, that this custom was unreasonable, and could not be supported. *Leuckhart v. Cooper*, 150.

## DISTRINGAS.

See PRACTICE, 1.

## DOWER.

See ESTOPPEL.

## EASEMENT.

See PLEADING, 15. 22.

## ECCLESIASTICAL LAW.

See SEQUESTRATION, 1, 2. LEASE, 1.

## EJECTMENT.

See COSTS, 1. LANDLORD AND TENANT, 1. PRACTICE, 18.

Under special circumstances, a rule absolute for judgment against the casual ejector will be granted, although the tenant in possession has not been personally served. *Doe d. March v. Roe*, 199.

## ELECTION PETITION.

See PARLIAMENTARY LAW, 1, 2, 3, 4, 5, 6.

## ESTOPPEL.

Where lands were conveyed by deed which described them as being freehold, and a claim for dower was afterwards set up by the wife of the vendor:—*Held*, that the purchaser was not estopped from showing that the vendor was only possessed of a term of years in the lands. *Gaunt v. Wainman*, 184.

## EVIDENCE.

See NEW TRIAL, 1. PRACTICE, 9. 16, 17.

1. In trover to recover a watch, the defendant pleaded that it was not the property of the plaintiff. It appeared that the watch had formerly been the property of the father of the plaintiff and defendant, who were two brothers. The defendant proved in evidence letters of administration of his father's effects, which had been granted to him—*Held*, that the plaintiff, in answer to this evidence, was entitled to give evidence of conversations in which the deceased had stated that he had given the watch to the plaintiff. *Smith v. Smith*, 130.

2. The declaration stated that the defendants consented to refer certain disputes to the award of arbitrators, and that they afterwards signed an agreement and undertaking, which the arbitrator directed that they should sign:—*Held*, that proof of the defendant's signature to the agreement and undertaking, was sufficient evidence that they had submitted the matters in dispute to arbitration. *Stuart v. Nicholson*, 191.

3. A contract was made for the sale of a certain quantity of "Scott & Co.'s mess pork," and it appeared by the evidence of mercantile men, that Scott & Co. were accustomed to prepare and manufacture pork of a superior quality, which insured it a premium in the market:—*Held*, that the warranty was not satisfied by supplying pork which had merely passed through the hands of Scott & Co as consignors, and which bore their brand-mark, but that it meant pork of their manufacture:—*Held*, also, that the evidence of the mercantile men was properly received. *Powell v. Horton*, 12.

## EXECUTORS.

See COSTS, 8.

The defendant entered into a parol agreement with one *Peto*, for a lease of certain premises; but *Peto* died before any lease was executed. The plaintiffs were *Peto's* executors; and a master in chancery having decided that the contract was void under the Statute of Frauds, a new contract was made between the defendant

upon the ground that no apprenticeship for five years was required for the business of a surgeon, and that the defendant could not object to the legality of his own bond; but the Court refused to grant a rule:—*Held* also, that the plaintiffs were not entitled to be relieved from payment of costs under 3 & 4 W. 4, c. 42, s. 31. *Prole v. Wiggins*, 204.

### COPYHOLD.

The admission of a tenant for life to copyhold lands is the admission of the remainder-man, and the lord of the manor is not entitled to a fine against the remainder-man, unless by virtue of a custom within the manor. *Phypers v. Eburn*, 230.

### COSTS.

See INTERPLEADER, 1. PARLIAMENTARY LAW, 4, 5. PRACTICE, 10. 15.

1. An action of ejectment was referred by an order at nisi prius, and the arbitrator was empowered to award the defendant a compensation for buildings erected on the premises. The arbitrator ordered a verdict to be entered for the plaintiff, and awarded the defendant a sum of money for the buildings:—*Held*, that this sum of money might be set off by the plaintiff against the costs which the defendant was liable to pay him, but that it was subject, under Reg. 93 H. T. 2 Will. 4, to the defendant's attorney's lien for his costs. *Doe d. Swinston v. Sinclair*, 111.

2. Where less than 20*l.* was awarded to the plaintiff, on a writ of inquiry in an action of covenant, and the prothonotary taxes the costs, according to the lower scale, promulgated March 15, 1834, the Court refused to interfere with the taxation. *Hoppel v. Leigh*, 107.

3. Where a *grand cape* was set aside for irregularity, the Court refused to make the rule absolute with costs. *Foot v. Sheriff*, 108.

4. Section 50 of the Insolvent Debtors' Act, (7 G. 4, c. 57,) provides that the discharge of a prisoner shall extend to all process and costs for contempt, and to all costs incurred by a creditor in any action or suit brought for the recovery of any debt or damages:—*Held*, that this was applicable to the costs of an action of trover, in which the verdict was obtained before, and the costs were taxed after the filing of the insolvent's petition. *Goldamid v. Lewis*, 142.

5. Where an action was brought in *Surrey*, on a bill of exchange, and the prothonotary taxed the plaintiff's costs as if the *venue* had been laid in *London*, where the attorney and witnesses resided; it was *held* that the taxation was incorrect, and that the plaintiff was entitled to the costs of trying the cause in *Surrey*. *Vere v. Moore*, 200.

6. In an action for assault, battery, and false imprisonment of the plaintiff's wife, the defendant pleaded, first, not guilty; secondly, that the party was not the plaintiff's wife; thirdly, a justification. A verdict was found for the plaintiff, with one farthing damages on the two first issues, and for the defendant on the third:—*Held*, that the judge was authorized to give a certificate to deprive the plaintiff of his costs, under 43 Eliz. c. 6. *Wilson v. Lainson*, 249.

7. Where a defendant pleads various pleas, to parts of the sum mentioned in the declaration, and also pays money into court, and the plaintiff enters a *nolle prosequi*, as to the pleas of payment, the defendant is entitled to his costs, under sec. 33, 3 & 4 W. 4, c. 42. Where various defences are pleaded to one demand, and the plaintiff enters a *nolle prosequi*, he is liable to the costs of all the pleas. *Williams v. Sharwood*, 248.

8. In an action on a bond by the administrators of the obligee, it was pleaded that the bond was given in pursuance of a corrupt agreement that the obligee should take the son of the obligor as his apprentice, to learn the profession of surgeon, apothecary, and man-midwife, for two years only; but that in certain articles of agreement, it should be made to appear that the apprentice was articulated for five years, in order that by such corrupt contrivance the parties might fraudulently and illegally procure the apprentice to be admitted for the purpose of practising as an apothecary upon serving two years instead of five years, as required by the statute. After verdict it was moved to enter judgment for the plaintiff *non obstante verdicto*, upon the ground that no apprenticeship for five years was required for the business of a surgeon, and that the defendant could not object to the legality of his own bond; but the Court refused to grant a rule:—*Held* also, that the plaintiffs were not entitled to be relieved from payment of costs under 3 & 4 W. 4, c. 42, s. 31. *Prole v. Wiggins*, 204.

9. In trespass for breaking a house, the defendant pleaded not guilty, and an entry to make a distress; a verdict was found for the plaintiff on the first issue, damages one farthing; and for the defendant on the second issue:—*Held*, that the plaintiff was not entitled to costs, unless the judge certified under 22 & 23 Car. 2, c. 9. *Dunnage v. Kemble*, 304.

10. Where one attorney brought an action against another attorney for his bills of costs for agency business:—*Held*, that the bill was not taxable. *Weymouth v. Knipe*, 280.

### COVENANT.

See LANDLORD AND TENANT, 2. LIMITATIONS, STATUTE OF, 2, 3. PLEADING, 17.

## CUSTOM.

See COPYHOLD, 1.

In trover, the defendant justified the holding of certain bales of wool, under an ancient custom used in the trade of public warehouse-keepers in London, for a general lien upon all goods housed in their warehouses for or in the name of the merchants or other persons by whom such warehouse-keepers were retained, for all monies, or any balance thereof, due from such merchants or other persons to such warehouse-keepers for or on account of any advances or expenses which such warehouse-keepers had made, or had been put to, in paying the duties and customs by law imposed and charged on goods consigned to such merchants and other persons from abroad; and in paying the freight and other charges, and the advances, charges, and claims which the warehouse-keepers should have made, or have been put to, for entering, landing, and warehousing the said goods:—*Held*, upon motion after verdict, that this custom was unreasonable, and could not be supported. *Leuckhart v. Cooper*, 150.

## DISTRINGAS.

See PRACTICE, 1.

## DOWER.

See ESTOPPEL.

## EASEMENT.

See PLEADING, 15. 22.

## ECCLESIASTICAL LAW.

See SEQUESTRATION, 1. 2. LEASE, 1.

## EJECTMENT.

See COSTS, 1. LANDLORD AND TENANT, 1. PRACTICE, 18.

Under special circumstances, a rule absolute for judgment against the casual ejector will be granted, although the tenant in possession has not been personally served. *Doe d. March v. Roe*, 199.

## ELECTION PETITION.

See PARLIAMENTARY LAW, 1, 2, 3, 4, 5, 6.

## ESTOPPEL.

Where lands were conveyed by deed which described them as being freehold, and a claim for dower was afterwards set up by the wife of the vendor:—*Held*, that the purchaser was not estopped from showing that the vendor was only possessed of a term of years in the lands. *Gaunt v. Wainman*, 184.

## EVIDENCE.

See NEW TRIAL, 1. PRACTICE, 9. 16, 17.

1. In trover to recover a watch, the defendant pleaded that it was not the property of the plaintiff. It appeared that the watch had formerly been the property of the father of the plaintiff and defendant, who were two brothers. The defendant proved in evidence letters of administration of his father's effects, which had been granted to him—*Held*, that the plaintiff, in answer to this evidence, was entitled to give evidence of conversations in which the deceased had stated that he had given the watch to the plaintiff. *Smith v. Smith*, 130.

2. The declaration stated that the defendants consented to refer certain disputes to the award of arbitrators, and that they afterwards signed an agreement and undertaking, which the arbitrator directed that they should sign:—*Held*, that proof of the defendant's signature to the agreement and undertaking, was sufficient evidence that they had submitted the matters in dispute to arbitration. *Stuart v. Nicholson*, 191.

3. A contract was made for the sale of a certain quantity of "Scott & Co.'s mess pork," and it appeared by the evidence of mercantile men, that Scott & Co. were accustomed to prepare and manufacture pork of a superior quality, which insured it a premium in the market:—*Held*, that the warranty was not satisfied by supplying pork which had merely passed through the hands of Scott & Co. as consignors, and which bore their brand-mark, but that it meant pork of their manufacture:—*Held*, also, that the evidence of the mercantile men was properly received. *Powell v. Horton*, 12.

## EXECUTORS.

See COSTS, 8.

The defendant entered into a parol agreement with one *Peto*, for a lease of certain premises; but *Peto* died before any lease was executed. The plaintiffs were *Peto's* executors; and a master in chancery having decided that the contract was void under the Statute of Frauds, a new contract was made between the defendant



and the plaintiffs for a lease of the same premises, which was afterwards executed; and the solicitor to the plaintiffs prepared the lease. The defendant refused to pay for the lease which had been so prepared; whereupon the executors paid the attorney, and brought this action in their own name, for money paid to the defendant's use. At the trial it was proved, that it was the general practice in *London*, for the lessee to pay the lessor's attorney the expenses of preparing a lease:—*Held*, that the plaintiffs were not bound to sue as executors; and, secondly, that the action for money paid was maintainable without declaring specially. *Grissell v. Robinson*, 138.

### FALSE JUDGMENT.

See PRACTICE, 10. 13.

### FINE.

See PRACTICE, 20.

### FOREIGN ENLISTMENT.

See TRESPASS, 1.

### FORGERY.

See BILLS OF EXCHANGE, 1.

### FRAUDS, STATUTE OF.

1. The Statute of Frauds (29 Car. 2, c. 3, s. 4,) does not require that an agreement, upon a contract for the sale of land, should be signed by both parties; it is sufficient if it is signed by the party to be charged as defendant in the action. *Laythorpe v. Bryant*, 25.

2. Where, by the particulars and conditions of sale, it appeared that A. was the auctioneer, and B. the owner of certain premises, and C. signed an agreement on the back of the conditions to purchase the premises: it was held, that the names of the contracting parties sufficiently appeared. *Id.*

### FREIGHT.

See LIEN.

### HABEAS CORPUS.

A writ of *habeas corpus* was obtained against the warden of the Fleet, for the purpose of trying the validity of a warrant signed by commissioners of bankrupt, whereby a bankrupt was committed to prison for not answering certain questions to the satisfaction of the commissioners. The warden returned that the prisoner was in

custody under detainers for debt; and that the warrant, which was directed to the keeper of *Newgate* and all other persons whom it might concern, was afterwards lodged with him.—*Held*, that the prisoner was not entitled to a writ of *habeas corpus*, because he was not in custody under the warrant. *Esparte Garcia*, 278.

### HUSBAND AND WIFE.

See ACKNOWLEDGMENT, 1, 2. LIMITATIONS, STATUTE OF, 1. PLEADING, 19.

### INSOLVENT.

See COSTS, 4. PRISONER, 1, 2.

### INSURANCE.

1. A. contracted to sell the plaintiff a quantity of oats to be shipped in *Ireland* by persons of whom A. had previously purchased the oats; and A. having informed the plaintiff that the oats were about to be shipped on board the *Gibraltar* packet, the plaintiff effected an insurance on the cargo with the defendant. A misunderstanding afterwards arose between A. and the plaintiff, as to the place in which the *Gibraltar* packet should discharge her cargo, she being bound for *Southampton*, but the plaintiff contending that he was entitled to receive the oats delivered at *Portsmouth*; A. thereupon sold the oats which were on board the *Gibraltar* to another person at *Southampton*, but the plaintiff gave notice to the purchaser that he insisted on having the oats forwarded to *Portsmouth*. It was subsequently ascertained that the *Gibraltar* packet and her cargo was totally lost on her passage from *Ireland*. The plaintiff afterwards sold his interest in the policy to A. Under these circumstances, it was held, that the plaintiff had an insurable interest when the policy was effected, and that he was entitled to recover in an action against the underwriter. *Sparkes v. Marshall*, 44.

2. By a policy of assurance, hides were insured from *Valparaiso* to *Bordeaux* free of particular average, unless the ship was stranded. The hides were damaged on the voyage by perils of the sea, and when the vessel put into *Rio Janeiro* to refit, they were found to be in a state of putrefaction, and that it was impossible to carry them in a saleable state to the termination of the voyage; the hides were consequently sold for a small price at *Rio* for the purpose of being tanned:—*Held*, that this was not the case of a constructive loss, but of an absolute total loss; also, that no notice of abandonment was necessary. *Roux v. Salvador*, 209.

### INTEREST.

See PLEADING, 20.

## INTERNATIONAL LAW.

See TRESPASS, 1.

## INTERPLEADER.

Where a defendant obtained a rule under the Interpleader Act, upon a suggestion that a third party claimed the amount in his hands, for which he was sued, and it appeared, on showing cause, that the defendant had no just expectation that he should be sued by the third party, the Court discharged the rule with costs. *Harrison v. Payne*, 107.

## LANDLORD AND TENANT.

See LEASE, 1. LIMITATIONS, STATUTE OF, 2, 3. PRACTICE, 18.

1. A lessee for years mortgaged his estate, and his term having become forfeited, the superior landlord recovered the premises by ejectment, and granted a new lease to the mortgagee, who, having received the possession of the premises from the mortgagor, returned the key of the house to him, saying, "Go on as before; pay me the money you owe me, and then you shall have a lease."—*Held*, that this did not create a tenancy from year to year, and that upon non-payment of the money due, and no rent having been paid, the mortgagee was entitled to maintain an ejectment without six months' notice to quit. *Doc d. Rogers v. Pullen*, 39.

2. Where there is a general covenant to repair a house and premises, and to leave them in repair at the expiration of the term, upon an action for a breach of the covenant, the lessee cannot show that the premises were out of repair at the commencement of the lease; but he may show that the premises were old, because the lessee is only bound to keep up the house as an old house. *Stanley v. Tvingood*, 132.

## LEASE.

See EXECUTORS, 1.

An ecclesiastical lease was made by a vicar, for 21 years from its date, of certain messuages in London, not used for the habitation of the vicar; at that time less than three years were unexpired of a former lease for 40 years, of the same premises.—*Held*, that the lease was valid and binding on the vicar's successor, it not being within either of the restraining acts of Elizabeth, viz. 13 Eliz. c. 10, 14 Eliz. c. 11, and 18 Eliz. c. 11. *Vivian v. Blomberg*, 255.

## LIBEL.

See ACTION, 1. PLEADING, 18.

## LIEN.

See ACKNOWLEDGMENT, 1. CUSTOM, 1.

1. In trover, by the assignees of a bankrupt to recover a policy of insurance, the defendant pleaded a custom for insurance brokers to have a general lien upon policies of insurance in their possession for their general balance; that mutual dealings and accounts existed between the bankrupt and the defendant; and that at the time of the conversion the bankrupt was indebted to the defendant in 200*l*. Replication—that the 200*l*. was the price of goods sold to the bankrupt upon twelve months' credit; and that a bill of exchange was drawn and accepted in payment, which bill was not due at the time of the conversion. *Held*, first, that by taking the security the lien was gone; secondly, that the defendant could not rest his defence upon the statute relating to mutual credits, (6 G. 4, c. 16, s. 50,) without specially pleading the facts; thirdly, that if the plea of mutual credits were set up, then it could not succeed, because it did not appear that the balance was due at the time of the bankruptcy. *Hewison v. Guthrie*, 51.

2. An owner, who remains in possession of a ship, has a lien on the goods on board belonging to the charterer, for the freight due under the charter-party. *Campion v. Colvin*, 116

## LIMITATIONS, STATUTE OF.

See PLEADING, 15. 20. 22.

1. The 9 G. 4, c. 14, sec. 1, directs, that no acknowledgment or promise shall be sufficient to take a case out of the Statute of Limitations, unless it be in writing, "and signed by the party chargeable thereby."—*Held*, that an acknowledgment contained in a letter which was written by the wife of the defendant, in his name, and at his request, was insufficient, because the statute gives no authority to an agent to make the acknowledgment. *Hyde v. Johnson*, 94.

2. In covenant for rent reserved, on an indenture of demise, the limitation of the right to sue is provided for by 3 & 4 W. 4, c. 42, sec. 3, which *pro tanto* repeals the 3 & 4 W. 4, c. 27, sec. 42. *Paget v. Foley*, 32.

3. *Semble*. (*Bosanquet*, J. dissentiente,) that the 3 & 4 W. 4, c. 27, sec. 42, does not apply to rents reserved on specialty. *Id*.

## MAINTENANCE.

See ACTION, 1.

## MASTER AND SERVANT.

See PLEADING, 5.

## MERCANTILE LAW.

See CONTRACT, 3. CUSTOM, 1. INSURANCE, 1, 2.

LIEN, 1, 2. PLEADINGS, 17. 21. 23.

## MORTGAGE.

See STAMP. 1. LANDLORD AND TENANT, 1.

## NEW TRIAL.

See PLEADING, 24, 25.

1. Where inadmissible evidence was received without objection, and the judge, in summing up, made strong observations upon its effect, *held*, not to amount to a misdirection. *Melin v. Taylor*, 3.

2. A remark made by the jury during the summing up of the judge, will not affect a verdict which is afterwards formally delivered and recorded; although such remark was inconsistent with the verdict. *Napier v. Daniel*, 187.

3. Where less than 20*l.* is sought to be recovered, the Court will not grant a new trial to the plaintiff, as upon a perverse verdict, although the verdict was clearly wrong. *Armstrong v. Free*, 197.

## PARLIAMENTARY LAW.

1. Upon an application to enforce the speaker's certificate to recover costs incurred before a select committee on an election petition, as directed by 9 G. 4, c. 22, s. 60, the Court will inquire whether the committee was appointed in the mode required by the statutes, and if the appointment of the committee takes place under circumstances where the statute does not allow the appointment to be made, or in a manner contrary to or inconsistent with the essential requisites prescribed by the statute, there is no court at all, and the whole proceedings take place *coram non iudice*. *Ransom v. Dundas*, 155.

2. Sect. 2 of the 9 G. 4, c. 22, directs, that, whenever a petition complaining of the undue election of a member of parliament shall be presented, a day and hour shall be appointed for taking the same into consideration, and notice in writing shall be given by the speaker to all par-

ties, and where the conduct of the returning officer is complained of, to the returning officer; and by sec. 36 it is enacted, that, in certain cases, the House shall determine whether the returning officer shall be allowed to strike in reducing the committee. A petition was presented against the return of two members, and it complained incidentally of misconduct and partiality in the returning officers:—*Held*, that the returning officers were not called upon, as original parties to the petition, to appear before the House; and that, even if they were held to be included within the petition, they had no power, under the statute, to interfere in striking the committee. *Id.*

3. Where the returning officers appeared before the committee, but in the report nothing was decided as to whether the charge against them was frivolous or vexatious:—*Held*, that this omission did not avoid the whole report. *Id.*

4. Sect. 5 of the statute directs that no proceedings shall be had upon any petition, unless the person or persons subscribing the same, or some one or more of them, shall personally enter into a recognizance, according to the form thereunto annexed, for the payment of all costs which shall become due to any witness summoned *in behalf of the person or persons so subscribing such petition*, or to any party who shall appear before the House, or any committee of the House, in opposition to such petition. A petition was presented, signed by three persons, one of whom entered into the recognizance, which was drawn in the form of the schedule, by which he undertook to pay all costs which should become due to any witness summoned *on his behalf*, or to any party who should appear before the House:—*Held*, that the recognizance was not open to any objection which affected it in substance or legal operation. *Id.*

5. The certificate of the speaker is conclusive evidence as to the amount of the costs for which the verdict is to be entered up; and the Court has no power to try the propriety of the allowance, or the principle upon which it was conducted. *Id.*

6. Where the Court had ordered judgment to be entered up on the speaker's certificate, under 9 G. 4, c. 22, s. 63:—*Held*, that the defendants could not have the proceedings upon which the judgment was founded entered on the roll by way of suggestion, for the purpose of bringing error. *Id.*

## PARTNER.

See BANKERS.

## PARTY WALLS.

See PLEADING, 6, 7, 8, 9.

# PATENT.

See PRACTICE, 9.

In a patent for the improvement of the manufacture of elastic goods, one of the objects proposed by the patentee in his specification, was to produce cloth from cotton or other materials, in which should be interwoven elastic cords or strands of indian-rubber, wound round with filamentous materials. After describing the manner of effecting this object, it was stated, that by this process, a cloth was produced which should afford any degree of elastic pressure, according to the proportion of the elastic and non-elastic material. It appeared, that the use of elastic strands of indian-rubber, covered with a filamentous material, was known before, and also the use of cotton materials; but the placing them together side by side as a warp was new. It was proved, that the new manufacture formed a web which combined the two qualities of great elasticity and a limit thereto; that it was a cheaper, lighter, and more porous article than any which had been before produced. In an action for infringing this patent, the jury found a verdict for the plaintiff, and the Court held, that this was a new manufacture within the statute of *James*, and refused to set aside the finding of the jury. *Cornish v. Keene*, 281.

# PLEADING.

See ACTION. 1. CONTRACT, 4. COSTS, 7.

LIEN, 1. TRESPASS, 1, 2.

## I. DECLARATIONS:

1. The plaintiff averred in his declaration that he was possessed of shares in a certain mine, which were worked to his great profit, and that the defendant published a libel, in which it was alleged that certain legal proceedings had been taken in Chancery against the plaintiff, and that persons duly authorized by the Court of Chancery had arrived on the workings at the mine, by means whereof his shares became much depreciated in value, and the plaintiff had been prevented from disposing of his shares, and from deriving profits which would otherwise have accrued to him:—*Held*, first, that in such an action the plaintiff must allege and prove special damage; secondly, that the declaration did not contain such a sufficient allegation of special damage. *Malachy v. Soper*, 217.

2. In an action on the case, the plaintiff declared that he was possessed of a "messuage and premises," with the appurtenances; the plea traversed this allegation, and at the trial it appeared that the plaintiff had the separate use and occupation of only one floor of a dwelling-house:—*Held*, that the evidence did not negative the allegation that the plaintiff was possessed of a messuage. *Fenn v. Grafton*, 58.

3. Whether the declaration was subject to a

special demurrer, on the ground of uncertainty, by the improper use of the word "messuage," *quære*. *Id*.

4. It cannot be proved under a plea of *non-assumpsit* that a bond was accepted by the plaintiff, in satisfaction of money which was lent and advanced two days before the bond was given. *Weston v. Foster*, 59.

5. A domestic servant was hired at twelve guineas a year, and after she had served nearly two months, her mistress sent her to prison, on a charge of felony; she remained in prison until two days after the expiration of two months' service, when she returned to her mistress's house, and took away her clothes, the charge of felony not being further prosecuted:—*Held*, that the servant was entitled to three months' wages, and that under an *indebitatus* count for work and labour. *Smith v. Guinsford*, 109.

6. In case the plaintiff declared that he was possessed of a vault, which adjoined other vaults, and that he was of right entitled that his vault should be supported by the adjoining vaults, and that he of right enjoyed certain foundations for the support of his vault; but that the defendant wrongfully and injuriously pulled down the adjoining vaults, without shoring up the plaintiff's vault; and also made excavations and disturbed the foundations, without taking due and proper precautions to prevent the foundations from being weakened. *Held*, after pleading over, that the count contained a clear and substantial ground of action, viz.—that of negligence and carelessness in the exercise of the defendant's rights; and that, if the defendant meant to object, that the plaintiff's title was not alleged with sufficient certainty, he ought to have demurred specially. *Trower v. Chadwick*, 267.

7. A second count alleged, that the plaintiff was possessed of a vault, and that the defendant was about to remove other vaults next adjoining to it, and that it was the duty of the defendant, to give notice of such his intention; and also, to use due care and skill, and take reasonable precautions in pulling down the vaults; and that the defendant wrongfully and injuriously pulled down the vaults without giving notice, and that he did not use due care and skill, or take reasonable precautions, but that he pulled down the vaults in a careless, unskillful, and improper manner, by reason whereof, the vault of the plaintiff was weakened. *Held*, that the allegation of want of care and skill, shewed a breach of duty which was imposed by law, and that the declaration shewed a good ground of action. *Id*.

8. Whether the obligation to give notice to the plaintiff, resulted as an inference of law, from the mere juxta position of the walls.—*Query*. *Id*.

9. A plea to the first count, that the defendant was not bound, by law or otherwise, to shore up the plaintiff's vault, is bad; first, because it traverses that which is only the description of the

means by which the injury was sustained; and secondly, because it raised an issue of law. *Id.*

10. Where the defendant is the proximate cause of damage, it is no answer to say that the falling of certain timber, which was the immediate cause of the damage, was not occasioned by any act or neglect of the defendant, or by the breach of any duty or act imposed upon him by law. *Id.*

11. An action was brought for a breach of the following agreement. The plaintiff agreed to buy, and the defendant agreed to sell his horse, *Parlington*, for 200*l.* provided he trotted 18 miles within one hour, within one month; and if the task was not performed, the horse was thereby sold to the plaintiff for 1*s.* which the plaintiff that day paid to the defendant. At the trial it appeared that the task was not performed, and that the defendant had refused to deliver the horse to the plaintiff; a verdict was found for the plaintiff:—*Held*, upon a motion to arrest the judgment, that this agreement was illegal, and within 9 Anne, c. 14; *Guslee, J., dissentiente*, who thought that the question of illegality ought to have been raised by a plea on the record. *Brogden v. Murriotti*, 136.

12. The defendant had entered into a parol agreement with one *Peto*, for a lease of certain premises; but *Peto* died before any lease was executed. The plaintiffs were *Peto's* executors; and a Master in Chancery having decided that the contract was void under the Statute of Frauds, a new contract was made between the defendant and the plaintiffs for a lease of the same premises, which was afterwards executed; and the solicitor to the plaintiffs prepared the lease. The defendant refused to pay for the lease which had been so prepared; whereupon the executors paid the attorney, and brought this action in their own name, for money paid to the defendant's use. At the trial, it was proved that it was the general practice in *London*, for the lessee to pay the lessor's attorney the expenses of preparing a lease:—*Held*, that the plaintiffs were not bound to sue as executors; and, secondly, that the action for money paid was maintainable without declaring specially. *Grissell v. Robinson*, 138.

## II. PLEAS.

13. In an action for a breach of promise of marriage, the defendant pleaded, first, that after the supposed promise he received information that the plaintiff was an unchaste person, and had committed fornication with one A. B., which information was true; wherefore he refused to marry the plaintiff. Secondly, that after the supposed promise he received information that the plaintiff had committed fornication with some person or persons, to the defendant unknown, and was pregnant with a child, which child he averred was subsequently born a bastard; wherefore he refused to marry the plaintiff:—*Held*, upon demurrer, that the pleas were good. *Young v. Murphy*, 14.

14. In an action on the case, for carelessly navigating a ship through the plaintiff's bridge, whereby the bridge was injured, the defendant pleaded that the plaintiffs had wrongfully narrowed the channel, and increased the rapidity of the current, and thereby rendered the passage of vessels difficult and dangerous; without this, that the vessel struck the bridge through the carelessness of the defendants; with a conclusion to the country:—*Held*, that, upon this issue, the defendants were entitled to show that the injury had not been caused through their carelessness, although they had failed in proving any default on the part of the plaintiffs. *Cross Keys Bridge Company v. Rawlings*, 147.

15. In trespass, the defendant pleaded under the 2 & 3 Will. 4, c. 71, that he had enjoyed a common of pasture as appurtenant to his messuage for a full period of thirty years before the commencement of the suit. The plaintiff demurred on the ground that the plea ought to have stated that the enjoyment had been for thirty years next before the commencement of the suit:—*Held*, that the plea was sufficient, for that the proof at the trial must show the enjoyment for thirty years preceding the action. *Jones v. Price*, 127.

16. Where a plea in trespass justified under a right of way over the *locus in quo* for the carriage of goods and water, and the jury negatived the right as to the goods, but affirmed it as to the water:—*Held*, that the plea was distributive, and that the defendant was entitled to have the verdict entered for him as to the right to carry water. *Knight v. Woore*, 129.

17. By an agreement under seal, it was recited that the defendants had fitted out a ship for the whale-fishery, and had appointed the plaintiff to be master upon the terms thereafter mentioned; the plaintiff then covenanted that he would proceed on the voyage, and obtain as good a cargo as might be within his power; that he would obey the owner's instructions; be as frugal as possible with the stores and provisions, and would not suffer any illegal acts on board the ship; the defendants then covenanted, "that on the performance of the before-mentioned terms and conditions, on the part of the plaintiff," they would pay a certain portion of the net proceeds of the voyage to the plaintiff. In debt upon this agreement, for not paying the plaintiff his share of the proceeds of the voyage, the defendants pleaded that the plaintiff had not obtained as good a cargo as was within his power; that he had not obeyed instructions, &c.:—*Held*, that the pleas were no answer to the action, because the performance of the covenants, by the plaintiff, was not a condition precedent; and that a cross action was the remedy for the defendants. *Stavers v. Curling*, 237.

18. Where a libel is justified in part, the test to try if the justification be complete, is to read the part which is not justified by itself, without reference to the other parts; and if it does not

clearly amount to a libel, the justification is complete. If the part which is not justified contains ambiguous statements, the Court will not draw any libellous inference from them, if the plaintiff has not done so in his declaration. *Clarke v. Taylor*, 65.

19. A feme sole replevied her goods, which had been distrained, and afterwards married; the defendants removed the proceedings out of the Sheriff's Court by *re. fa. lo.*, and the original writ was issued in the name of the feme sole:—*Held*, that the coverture was a good plea in abatement of the writ. *Hollis v. Freer*, 4.

20. In *assumpsit* for money due on a promissory note, payable with interest, the declaration stated, that the defendant had not paid the amount of the note and interest, "except interest on the said note from its date up to a certain day within six years next before the commencement of the suit." The defendant pleaded the Statute of Limitations in the usual form, and upon a demurrer to the plea, it was *held* that the plea was good, because the interest was accessory to the principal money; and the allegation of the payment of the interest was merely a statement of evidence, which might or might not take the case out of the statute; and *semble*, that the allegation of payment of interest was introduced prematurely, and need not be noticed in the plea. *Hollis v. Palmer*, 55.

21. In *assumpsit* for money paid to the defendant's use, the defendant pleaded non-*assumpsit*, and a special plea, which stated that the plaintiffs had been employed and retained as insurance brokers, to effect insurances on certain goods; but that they effected two policies of assurance, which, by reason of the carelessness, negligence, and want of skill of the plaintiffs, were worded in such a manner as not to be adapted to the insurance upon the said goods, and thereby the defendants were wholly uninsured; and that the money in the declaration mentioned was the amount of the premiums paid on the said policies. *Scmble*, that this plea was not bad on special demurrer, as amounting to the general issue. Whether this defence could be set up under non-*assumpsit*, *quære*. *Cole v. Le Souef*, 75.

22. In trespass, the defendant justified the trespasses, by claiming a right of way as having been used, of right, and without interruption, for forty years, by the occupiers of his farm; and the replication traversed the plea generally:—*Held*, that, under this plea, the plaintiff was entitled to show that the way had been used by his permission, and that he had received small payments as an acknowledgment; and that 2 & 3 Will. 4, c. 71, s. 5, which requires that any agreement or other matter not inconsistent with the simple fact of enjoyment should be specially pleaded, was not applicable to the case. *Beasley v. Clark*, 100.

23. In trover by the assignees of a bankrupt to recover a policy of insurance, the defendant

pleaded a custom for insurance brokers to have a general lien upon policies of insurance in their possession for their general balance; that mutual dealings and accounts existed between the bankrupt and the defendant; and that at the time of the conversion the bankrupt was indebted to the defendant in 200*l*. Replication—that the 200*l*. was the price of the goods sold to the bankrupt upon twelve months' credit; and that a bill of exchange was drawn and accepted in payment, which bill was not due at the time of the conversion. *Held*, first, that by taking the security the lien was gone: secondly, that the defendant could not rest his defence upon the statute relating to mutual credits, (6 G. 4, c. 16, s. 50,) without specially pleading the facts; thirdly, that if the plea of mutual credits were set up, then it could not succeed, because it did not appear that the balance was due at the time of the bankruptcy. *Hewison v. Guthrie*, 51.

### III. AIDED BY VERDICT.

24. In *indebitatus assumpsit*, it appeared on the record after verdict, that the promise was alleged to be made at a time after the writ issued:—*Held*, upon motion in arrest of judgment, that the date of the promise was immaterial, and that it must be presumed that a cause of action which accrued before the issuing of the writ was proved at the trial. *Arnold v. Arnold*, 189.

25. In *assumpsit* for money lent, the defendant pleaded that the plaintiff accepted a bottomry bond in satisfaction and discharge of the debt; it was proved that a bond was given, but only as an additional security for the money lent, and after verdict for the plaintiff the Court refused to grant a new trial. *Weston v. Forster*, 59.

### PRACTICE.

See ARBITRATION, 1, 2. COSTS, 10. EJECTMENT, 1. HABEAS CORPUS, 1. INTERPLEADER, 1. NEW TRIAL, 1, 2, 3. SEQUESTRATION, 1, 2.

### I. PROCEEDINGS TO APPEARANCE:

1. Where a judge at chambers had ordered a *distringas* to issue upon an affidavit, which shewed but two calls and one appointment to serve the summons, the Court refused to set it aside, after it was executed, the defendant not having sworn that he did not receive notice of the appointment. A writ of *distringas*, not indorsed with the amount of the debt and costs, is irregular. *Gule v. Winkes*, 265.

2. An order was made at chambers, requiring the plaintiff or his agent (who attended the summons,) to give further particulars of demand; the order not being complied with, a rule *nisi* was obtained, calling on the plaintiff's attorney to give further particulars of demand. Upon shewing cause, *held*, that service of the rule on the plaintiff was insufficient. *Stephens v. Underwood*, 200.

3. If the affidavit of the due taking of bail be sworn before the defendant's attorney, it is irregular. *Sherwood's Bail*, 200.

4. A copy of a writ of *capias* was served, without the requisite indorsement of the amount of the debt; and, after a bail-bond was given, a summons was taken out to set aside the bail-bond for irregularity, and a judge made an order accordingly. *Held*, that the summons ought to have been to set aside the copy of the *capias* and subsequent proceedings; and the judge's order was, consequently, discharged. *Yeates v. Chapman*, 262.

## II. DECLARATION AND SUBSEQUENT PROCEEDINGS :

5. A defendant is not entitled to a particular of demand, on a count on a bill of exchange. *Brookes v. Farlar*, 264.

6. In an action against an attorney for negligence, the Court refused to order the plaintiff to give a particular of his demand. *Stannard v. Ullithorne*, 247.

7. A rule to plead entered before notice of the declaration has been served upon the defendant, is irregular. *Bennett v. Smith*, 245.

8. Before the time for pleading expired, a judge's order for four days' time to plead was made by consent. *Held*, that the time was to be reckoned from the date of the order, on an affidavit being made that such an interpretation was understood between the parties when the order was made. *Lane v. Parsons*, 277.

9. An order was made at chambers, requiring the plaintiff or his agent (who attended the summons,) to give further particulars of demand; the order not being complied with, a rule *nisi* was obtained, calling on the plaintiff's attorney to give further particulars of demand. Upon shewing cause : *Held*, that service of the rule on the plaintiff was insufficient. *Stephens v. Underwood*, 200.

10. In an action for the infringement of a patent, the plaintiff will not be compelled to produce a specimen of the patent articles, to enable the defendant to prepare his defence to the action. *Crofts v. Peach*, 110.

## III. PROCEEDINGS AFTER VERDICT :

11. On a writ of false judgment from an inferior court, a rule was made absolute to enter up judgment for the plaintiff, and to issue execution for the sum recovered, with costs to be taxed by the prothonotary. The plaintiff taxed his costs on the back of the rule, and issued execution :—*Held*, that the proceeding was irregular, as no judgment was signed. *Finch v. Brook*, 99.

12. Rule 65 H. T. 2 W. 4, directs "that no motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the

expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term :—*Seem*, that this rule does not apply to causes tried out of term. *Weston v. Foster*, 63.

13. Before this rule of Court, in causes tried out of term, the practice in the Common Pleas was to move in arrest of judgment within the first four days of the following term; and, therefore, a rule to arrest the judgment was discharged, where it had been obtained more than four days after the commencement of the term following the trial. *Id.*

14. In debt, in a county court, the defendant pleaded a tender as to part of the demand, and *nil debet* to the residue. The jury found for the defendant on the latter plea; as to the tender they found certain facts, but were ignorant whether they amounted to a tender or not. The court below gave judgment for the defendant on this plea also, but it was subsequently reversed on a writ of false judgment, on the ground that the facts found did not shew a legal tender :—*Held*, that the plaintiff was entitled to have judgment entered up in his favour on the issue relating to the tender, although the verdict in the court below was not in the alternative, and although the usual nominal damages were not given by the jury. *Finch v. Brook*, 97.

## IV. GENERALLY :

15. When a defendant in custody on final process gives a cognovit, the rule Hil. T. 2 W. 4, No. 72, which requires the presence of the debtor's attorney, is not applicable. *Smith v. Jacobs*, 114.

16. A consent given by the plaintiff's attorney, that a judge's order shall be made to enter satisfaction on the judgment roll for the damages and costs in a suit, does not dispense with a warrant of attorney from the plaintiff. *Wood v. Hurd*, 115.

17. Upon default to try, after a peremptory undertaking has been given, it is no excuse to show the absence of a material and necessary witness. *Perqueres v. Bell*, 197.

18. Upon an application for a commission to examine a witness who is out of the jurisdiction of the Court, under 1 W. 4, c. 22, it is not necessary to shew the nature of the attempts which have been made to obtain his attendance; and a commission will be issued in an action for *crim. con.* as in other cases. *Norton v. Lord Melbourne*, 114.

19. When an application is made against a tenant, under 1 Geo. 4, c. 87, the original deed or agreement under which the tenements are held must be produced, properly stamped. *Doe d. Caulfield v. Roe*, 279.

20. A motion to enter up judgment on a warrant of attorney, was granted, where the de-

fendant was sworn to be alive seven days before the day the motion was made. *Drain v. Thompson*, 111.

21. The warrant of attorney in a recovery cannot be amended, even to the extent of transposing the names of the vouchee. *Lamont, Vouchee*, 264.

## PRISONER.

See HABEAS CORPUS, 1. PRACTICE, 14.

1. A debtor in execution for more than twelve months, for less than 20*l.* damages given in an action for *crim. con.* is entitled to his discharge under 48 G. 3, c. 123. *Goodfellow v. Robins*, 129.

2. A prisoner was remanded at the suit of the plaintiff, under the compulsory clauses of the Lord's Act, 32 Geo. 2, c. 28, for not delivering a schedule of his effects. In the following term, and sixty days having elapsed, a rule was obtained to bring up the prisoner to give the schedule; and, at the same time, a rule *nisi* was granted on behalf of the prisoner, to discharge him in the action, under the 48 Geo. 3, c. 123, as having been a twelvemonth in execution. The Court ordered the prisoner to comply with the rule to give a schedule; but on his refusal to do so, it was held, that he was entitled to his discharge under the 48 Geo. 3, c. 123. *Davis v. Curtis*, 252.

## PUBLIC COMPANIES.

See ACTION, 2.

## REPLEVIN.

See PLEADING, 19.

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*Yeates v. Chapman*, 262.

Hil. T. 4 Wm. 4. (Pleading.)

*Weston v. Foster*, 59.

*Cole v. Le Souef*, 75.

*Knight v. Woore*, 129.

## SEQUESTRATION.

1. By the 57 Geo. 3, c. 99, s. 26, a monition from the bishop, requiring an incumbent to reside in his benefice, is directed to be served in a particular manner; and by a subsequent section it is directed, that in all cases where proceedings are directed by monition, &c., such monition being "duly served," shall be returned into the registry of the bishop's court:—*Held*, that no explanation being given of the meaning of the words "duly served," the mode of service pointed out in the case of a monition to reside, was applicable to the service of a monition issued in pursuance of the statute, for the purpose of levying the salary of a curate by sequestration. *Green v. Cobden*, 6.

2. The statute directed the service of a monition to be by delivery to the incumbent, or by leaving it at his then usual or last place of abode, or if not then to be found, with the officiating minister or one of the churchwardens, and also by delivering a copy thereof at the house of residence belonging to the benefice. The incumbent was last in the parish in 1831, when he resided in the vicarage-house; his subsequent residence was unknown, but his daughter remained in the parish, and the officiating minister being himself the sequestrator, it was *held*, that the delivery of a copy of the monition at the vicarage-house was a sufficient service within the meaning of the statute. *Id.*

## SET OFF.

See COSTS, 1.

## SEWERS, COMPANY OF.

See ACTION, 2.

## SHERIFF.

1. Under the 61st section of 6 W. 4, c. 76, the sheriff of *Oxford* is not required to execute, in *Oxford*, writs which issue from the superior courts. *Granger v. Taunton*, 196.



## STAMP.

See PRACTICE, 18.

1. Where a mortgagor covenanted expressly to obtain a renewal of the lease of the premises mortgaged, and to assign it to the mortgagee:—*Held*, that the mortgage deed did not require a 25*l.* stamp. *Doe d. Jarman v. Larder*, 186:

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*Granger v. Taunton*, 196.

#### STOCK-JOBING.

See CONTRACT, 1, 2.

#### TRESPASS.

See ACTION, 2. PLEADING, 15, 16. 22.

1. In trespass for taking a steam-vessel, the defendant pleaded that he was an admiral in the *Portuguese* navy, and that he took the vessel as a lawful prize, which was condemned by the Supreme Tribunal of Marine, at *Lisbon*, and became forfeited to the Queen of *Portugal*. In other pleas the trespass was justified under the authority of the Queen of *Portugal*, *jure belli*. *Replication*, that the defendant, being a natural born subject of his majesty, in contravention of stat. 59 G. 3, c. 69, (the Foreign Enlistment Act,) accepted the commission of admiral, without the leave and license of the King of *England*:—*Held*, that the pleas were a conclusive bar to the action, and that the replication afforded no answer to the pleas. *Dobree v. Napier*, 84.

2. In another plea, the defendant pleaded, that the plaintiff had, without the leave and license of his majesty the King of *England*, equipped the steam-vessel for the service of a foreign prince, contrary to the said statute, 59 G. 3, c. 69, whereby the said vessel was forfeited to his said majesty:—*Held*, that this plea was insufficient, because it shewed no authority in the defendant to seize the vessel. *Id.*

#### TROVER.

See BILLS OF EXCHANGE, 1.

#### VARIANCE.

See PLEADING, 2.

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See PRACTICE, 19, 20.

#### WAY.

See PLEADING, 16. 22.

**LONDON: DAVIDSON, PRINTER,  
SMITH'S PLACE, CAREY STREET.**

# REPORTS OF CASES

ARGUED AND DETERMINED

IN

## The Court of Common Pleas,

WITH

A TABLE OF THE NAMES OF CASES

AND

*A DIGEST OF THE PRINCIPAL MATTERS.*

---

BY

WILLIAM HODGES, Esq. OF THE INNER TEMPLE,  
BARRISTER AT LAW.

---

VOL. III.

FROM HILARY TERM, SEVENTH WILL. IV. 1837,  
TO MICHAELMAS TERM, FIRST VICT. 1837.

BOTH INCLUSIVE.

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LONDON:

HENRY BUTTERWORTH,

New Bookseller and Publisher,

7, FLEET STREET,

AND RICHARD PHENEY, 89, CHANCERY LANE.

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1839.



**G. DAVIDSON, PRINTER,  
SERLE'S PLACE, CANNY STREET.**

## MEMORANDA.

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AFTER Hilary Term, Mr. Justice *Gaselee* resigned his seat on the bench, and on the 24th of February, *Thomas Coltman*, Esq., K. C., was appointed a Judge of the Court of Common Pleas in his room, and was knighted. He was first called to the degree of the coif, and gave rings with the motto—" *Jus suum cuique.*"

On the same day, *Francis James Newman Rogers* of Lincoln's Inn, Esq.; *Biggs Andrews*, of the Middle Temple, Esq.; *George Chilton*, jun., of the Inner Temple, Esq.; *John Evans*, of the Inner Temple, Esq.; and *Richard Budden Crowder*, of the Middle Temple, Esq.; were appointed his Majesty's Counsel.

A few days afterwards, *John Jervis*, of the Middle Temple, Esq., received a patent of precedence, to take rank before *Francis Whitmarsh*, Esq.; and the said *Francis Whitmarsh*, of Gray's Inn, Esq., and *Charles Purton Cooper*, of Lincoln's Inn, Esq., were appointed his Majesty's Counsel.

**J U D G E S**

**OF THE**

**COURT OF COMMON PLEAS,**

*During the Period of these Reports.*

---

The Right Hon. Sir N. C. TINDAL, Knt., C. J.

The Hon. Sir JAMES ALLAN PARK, Knt.

The Right Hon. Sir J. B. BOSANQUET, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt.

The Hon. Sir THOMAS COLTMAN, Knt.

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**ATTORNEY GENERAL.**

Sir JOHN CAMPBELL, Knt.

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Sir ROBERT MOUNSEY ROLFE, Knt.

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# CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term, 1837.

KNIGHT v. WOORE.

Com. Pleas.  
Jan. 30th.

WHATELEY had obtained a rule *nisi* calling upon the plaintiff to shew cause why the prothonotaries' taxation of the costs in this action should not be reviewed. The action was in trespass, for breaking the gate of the plaintiff, and entering his close. The defendant pleaded—First, not guilty. Secondly, that the *locus in quo* was a public highway, and that all the king's subjects had a right to use it with horses and carriages to fetch and carry goods and water thereon; and thirdly, a like justification, alleging the right to be for the inhabitants of *Monmouth* to use the way for the same purposes. At the trial, a verdict was found for the plaintiff on the first and second issues; and for the defendant on the third issue, so far as it related to the carrying of water, but the jury negatived the defendant's right as to the carriage of goods.

The prothonotary allowed the plaintiff the costs of the first and second issues, and also the general costs of the cause; he allowed the defendants the costs of such witnesses as had proved the right to use the way for the carriage of water alone; but where the witnesses spoke to the defendants' right to carry goods and water, he did not allow any costs. He also disallowed the costs of maps prepared for the defendant, and counsels' fees for a consultation before the trial, as well as the defendants' attorneys' costs for attending at the trial.

*R. V. Richards*, shewed cause.—This question depends upon rule H. T. 2. W. 4, No. 74, which directs, that "No costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded: and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." *Lardner v. Dick* (a) is in point. There it was held

In trespass for breaking a close, the defendant pleaded 1st, not guilty, 2nd, that all the king's subjects had a right of way, over the *locus in quo*, to carry goods and water, and 3rdly, a similar right limited to the inhabitants of M—. The jury found for the plaintiff on the first and second issues, and for the defendant on the third issue so far as it related to the carrying of water only:—*Held*, that this verdict was substantially in favor of the defendant, and that he was entitled to the general costs of the cause, including the costs of those witnesses who proved the defendant's claim as to the carriage of water, but disapproved it as to the carriage of goods.

(a) 2 Cr. & M. 389.

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that where several issues are found for the plaintiff and some for the defendant, the latter is entitled to the costs of the issues found for him; but he is not entitled to the costs of his witnesses, unless their testimony was confined to the issues found for him. *Frankum v. The Earl of Falmouth (b)* is to the same effect.

*Whateley* in support of the rule. One principle is applicable to all the cases decided upon this rule of court, namely, that the party who substantially succeeds in the action is entitled to the general costs. That rule was acknowledged in *Richards v. Cohen (c)*. *Frankum v. The Earl of Falmouth (b)* supports the present application, because the right to the water, upon which the plaintiff there relied, was found against him, and it was held that he was not entitled to the general costs of the cause, although the issues, on the plea of not guilty and another plea, were found in his favour. In *Eades v. Everatt (d)*, *Parke, J.* says, "If the witness would not have been brought forward, except for the introduction of those counts in the declaration on which the party succeeded, he was substantially a witness on those issues; merely asking questions upon other counts upon which he really was not brought forward, is hardly sufficient to warrant his being considered as a witness on the latter counts."

**TINDAL, C. J.**—I am of opinion that upon this finding of the jury, the defendant is the person who is substantially entitled to the verdict in this case. This is an action of trespass, and three pleas are pleaded; and in the third plea the defendant sets up a right to use the road for the purpose of carrying water and goods. This plea is severed into two separate issues by the replication; one relating to the right to carry water, and the other to the right to carry goods. Now if the defendant has succeeded in establishing his right to carry either water or goods, he is the party who has really and substantially recovered in the action; and if he has put other pleas on the record which he has not established, he is sufficiently punished by being deprived of the costs of such pleas. Being then entitled to the general costs in the cause, is he entitled to the costs of those witnesses who spoke as to the right to carry goods as well as water? The circumstance that the witnesses spoke against the defendant's right upon one point, is no reason why he should not be allowed the expenses of such witnesses. This is the converse of the case of *Richards v. Cohen (c)*, and the defendant is entitled to the general costs, upon the authority of that case and *Frankum v. The Earl of Falmouth (b)*. The expenses of the maps, consultation, and attendance must also be allowed.

**PARK, J.**—The officers of the court are placed in a difficult situation in consequence of the new rule; but I agree that this taxation ought to be reviewed.

**GASELEE, J.** and **VAUGHAN, J.** concurred (e).

Rule absolute (f).

(b) 4 Dow. P. C. 65. 1 Har. & Wol. 337.

(c) 1 Dow. P. C. 533.

(d) 3 Dow. P. C. 687.

(e) Mr. J. Bosanquet was prevented, by

indisposition, from attending the Court after the first day of this Term.

(f) See *Broadbent v. Shaw*, 2 B. & Ad. 940; *Probert v. Phillips*, 2 M. & Welsby, 40.

## MORGAN and another, v. PEBRER.

**ASSUMPSIT.**—The declaration stated, for that whereas heretofore, to wit, on, &c., in consideration that the plaintiffs, at the special instance and request of the defendant, would purchase for the defendant a large amount, to wit, 10,000*l.* of a certain foreign security, commonly called or known by the name of *Spanish Cortes* bonds; and also, in consideration that the plaintiffs, at the special instance and request of the defendant, would purchase for the defendant a large amount, to wit, 30,000*l.* of a certain other foreign security, commonly called or known by the name of *Spanish Scrip*, the defendant undertook and then faithfully promised the plaintiffs to indemnify and secure the plaintiffs against all losses, damages and expenses which they should or might incur, bear, pay, or sustain by reason of their purchasing the said securities for the defendant, by giving to, or depositing with the said plaintiffs, the value and amount of 10 *per centum* on the market prices of the said securities, so to be purchased by the plaintiffs for the defendant as aforesaid; and also, that in the event of the prices or value of the said securities, so to be purchased by the plaintiffs for the defendant, falling or coming lower than the value or amount of 10 *per centum* on the said market price, the said defendant would replace the said amount of 10 *per centum*, by giving or depositing with the plaintiffs, a further sum or amount of 10 *per centum* upon due notice, or that the said securities, so purchased by the plaintiffs for the defendant, should be sold; and the plaintiffs averred, that they, confiding in the promise and undertaking of the defendant, did afterwards, to wit, on, &c., purchase for the defendant a large amount, to wit, 10,000*l.* of the securities called *Spanish Cortes* bonds, and also a large amount, to wit, 30,000*l.* of the other securities called *Spanish Scrip*, of all which the defendant had notice; nevertheless, the defendant disregarding and neglecting his promise and undertaking, did not nor would give or deposit, with the plaintiffs, the value or amount of 10 *per centum* on the market price of the said securities so purchased by the plaintiffs for the defendant, but neglected and refused so to do. And the plaintiffs, in fact, further said, that the prices or value of the said securities so purchased by them for the defendant, did afterwards, to wit, on, &c., fall or come lower than the value or amount of 10 *per centum* on the market price of the said securities. And that they, the said plaintiffs, afterwards, to wit, on, &c., gave the defendant due notice of such depreciation or fall in the value or prices of such securities, and requested the said defendant to replace the said sum or amount of 10 *per centum* on the market price of such securities, according to his promise and undertaking. Yet the said defendant not regarding his said promise and undertaking, but contriving and intending to defraud the plaintiffs in that behalf, did not nor would replace the said sum or amount of 10 *per centum* on the market price of the said securities, but neglected and refused so to do. And the said plaintiffs further said, that by reason of the defendant's neglect and refusal to replace the said sum or amount of 10 *per centum* on the market price of such securities, they, the plaintiffs, were obliged to sell; and did afterwards, to wit, on, &c., sell the said securities so purchased by them for the defendant as aforesaid, for less prices than those for which they had purchased the same for the defendant, to wit, at the price of 40½ *per centum* for the security called *Spanish Scrip*, &c. being

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Jura. 30th.

1. A wager relating to the value of foreign funds is not illegal at common law; and therefore an action was held to be maintainable to recover differences paid by the plaintiffs on the depreciation of Spanish stock.

2. The stat. 14 Geo. 3, c. 43, is only applicable to gambling transactions arising on policies of insurance.

3. To a declaration in assumpsit for money paid to the defendant's use, &c. The defendant pleaded that the money was paid on account of a certain contract made between the plaintiff and defendant, relating to the purchase of foreign securities, whereon it was agreed that the defendant should repay the plaintiffs all advances made by him on account of the said securities, and should also, upon receiving reasonable notice pay certain deposits, in case the securities should be depreciated; and that if the defendant neglected to pay such deposits, that then the plaintiff should be at liberty to sell the securities, and that the defendant should reimburse the plaintiff any losses occasioned by such re-sale. The plea then averred, that in contravention of this agreement the plaintiff had sold the securities without giving any notice to the defendant to pay further deposits — *Held*, upon special demurrer, that the plea was bad as amounting to non assumpsit.

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 MORGAN  
 v.  
 PEBBLES.

the best prices they could obtain for the same, and that the balance, or difference between the prices at which the said securities were purchased by the plaintiffs for the defendant, and those for which the said securities were sold, amounted in the whole to a large sum of money, to wit, the sum of 2,600*l.*, whereof the said defendant afterwards, to wit, on, &c., had notice; nevertheless the defendant had not, although often required so to do, as yet paid to the plaintiffs the amount of the said balance, or difference, or any part thereof, but had hitherto wholly neglected and refused so to do, and still neglected and refused so to do.—2nd count, for work done in buying and selling securities; 3rd count, for money lent; 4th count, for money paid to defendant's use; 5th count, for interest; and 6th count, on an account stated.

The defendant pleaded *Non-assumpsit*, and several special pleas (a). The eighth plea to the first count stated, that the said contract was a certain contract by the plaintiffs as brokers, of the defendant knowingly made and negotiated for the pretended purchase of certain public securities, to wit, 10,000*l.* public securities called *Spanish Cortes* bonds, and 30,000*l.* public securities called *Spanish Scrip*, to be delivered on a future day, to wit, &c., which was, in truth and fact, a wager made respecting the price and value of certain public securities, given by the lawful government of *Spain* to the national creditors of *Spain*, which country and the lawful government thereof, was then and still is in amity with this realm and his present Majesty, the now King of this realm, and the price and value of which securities depended upon the prosperity of the said country of *Spain*, and the maintenance of peace by *Spain* with this realm and other nations. And by the said wager, under pretence of a contract, the plaintiffs, as brokers for the defendant, agreed with certain other persons to the defendant unknown, that then, if the price and value of the said securities should be higher on the said future day than on the day when the said wagering contract was made, to wit, higher than 60 *per centum*, he, the defendant, should receive the amount of the difference between the value of the said securities, to wit, &c., on the day when the said contract was made, to wit, 60 *per centum*, and the higher value on the said future day; and if the price and value thereof should fall, the defendant should in like manner pay the amount of difference between the value on the said day when the contract was made as aforesaid, to wit, 60 *per centum*, and the value on the said future day.—Verification.

Thirteenth plea—to the 3rd, 4th, 5th, and 6th counts of the declaration, that the said money was paid and lent, &c., in respect and on account of a certain contract made thentofore, to wit, &c., by which the plaintiffs undertook, in consideration that the defendant, at the request of the plaintiffs, had employed them as his brokers, at a certain reward and commission; that they, the plaintiffs, would find money and purchase for the defendant a large amount of certain public securities, to wit, 10,000*l.* *Spanish Cortes* bonds and 30,000*l.* of *Spanish Scrip* upon the terms following, that is to say, that the plaintiffs should receive 5 *per centum* upon all payments made by them on account of the said purchase, and that they should hold as security for all payments the said securities; and that as an additional security, the defendant should deposit 10 *per centum* upon the market price of the said securities.

(a) Some of these pleas were framed on stat. 7 Geo. 2, c. 8, but the demurrer was abandoned as to those pleas, in consequence

of the decisions in *Wells v. Porter*, 2 Hodges 78; *Oakley v. Rigby*, 2 Hodges 42; and *Elworthy v. Cole*, 1 Mee and Welsby, 31.

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and should, in case the securities should come lower in price, then, upon notice being given by the plaintiffs to the defendant, that he should from time to time deposit such a further amount as should, with the existing market price, maintain the deposit to the value of the securities at the time when the said contract was made, and 10 *per centum* thereupon; and that the plaintiffs should be repaid for all payments in the manner following, that is to say, that if the plaintiffs should, within a reasonable time after the making of the said purchase, give notice to the defendant to repay to them the amount of the payments made by them, he, the defendant, should, within a reasonable time after such notice, receive the said securities from the plaintiffs, and should repay to them all payments made by them with interest; or that if the securities should come lower in value than the said 10 *per centum* on the market price, and the defendant should, *on due notice being given to him by the plaintiffs*, neglect or refuse to deposit such additional sum as should keep up the deposit to 10 *per centum*, that the plaintiffs should be at liberty to sell the said securities and apply the proceeds to the repayment to them of any payments made by them; and that the defendant should reimburse the plaintiffs for any losses occasioned by such resale after notice as aforesaid.

The plea then averred, that the plaintiffs had purchased the said stock, and that the defendant had in all things, on his part, performed the agreement. That the defendant had deposited 10 *per centum* on the amount, and that the plaintiffs had not at any time given him notice to repay any advances made by them, or of any depreciation in value of the said securities; nevertheless, that the plaintiffs, in contravention of their said agreement, sold the securities and applied the proceeds in payment of such advance.—Verification.

*Demurrer to pleas.*—The causes of demurrer to the eighth plea were—That the plea did not shew that the contract was an illegal contract respecting securities for stock in the *British* public funds; and also because it appeared that it was a lawful contract respecting public securities of a foreign country; and also because it did not appear that the contract was in any respect a void or illegal contract.—The causes assigned to the *thirteenth* plea were that it contained a twofold answer to the counts in the declaration; to wit, an averment of the performance of the contract by the defendant, and also an averment of the non-performance of the contract by the plaintiffs; and also that the said plea was multifarious, and offered separate and distinct issues upon several independent facts; to wit, that the defendant paid, and that the plaintiffs received and accepted, a deposit of 10 *per centum* upon certain securities: and also that the plaintiffs had not given the defendant notice to repay the amount of any repayments or advances made by them: and also that the plaintiffs did not give the defendant notice of any depreciation or fall in the value of the securities purchased by them: and also that, in violation of their agreement, the plaintiffs had sold the securities purchased by them: and also that the plea amounted to the general issue, and tended to great and unnecessary prolixity of pleading: and also that the plea contained several distinct substantial matters of defence: and also that the plaintiffs could not take or offer any certain issue thereupon.

*Bagley*, in support of the demurrer.—This contract is said to be void at common law, as being an illegal wager. Wagers are not void at common



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law, except in some excepted cases. In *Da Costa v. Jones* (a), Lord Mansfield, C. J., says, "Indifferent wagers upon indifferent matters, without interest in either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by particular acts of parliament: and the restraints imposed in particular cases support the general rule." In *Wells v. Porter* (b) and *Oakley v. Rigby* (c), this Court intimated that contracts relating to jobbing in foreign funds were not illegal at common law; and in *Elsworth v. Cole* (d), the Court of Exchequer, during the last term, expressed their approbation of those decisions. Nor does this contract involve anything which is contrary to public policy. In *Jones v. Randall* (e), it was decided that an action would lie to recover money won upon a wager, whether a decree of the Court of Chancery would be reversed or not, on appeal to the House of Lords; and it was said that some motive of fraud, or other *turpis causa*, must appear, in order to make the wager illegal; *Allen v. Hearn* (f). The fifteenth plea, which is pleaded only to the *indebitatus* counts, is bad, as amounting to the general issue Non-assumpsit. *Jones v. Nanney* (g) is precisely in point. That was an action of assumpsit for the work and labour of the plaintiff as an attorney. The defendant pleaded, as to all the demand except 90*l.*, that the work was performed in endeavouring to secure the defendant's return to parliament, under an agreement that the plaintiff should receive no remuneration, but only his disbursements, and that 90*l.* was a fair remuneration for the plaintiff on that occasion; and the plea was held bad, as amounting to non-assumpsit. In *Grounsell v. Lamb* (h) it was also held in an action of assumpsit for a machine sold and delivered, that the defendant might shew, under *non-assumpsit*, that the machine was manufactured under a condition that if it did not work, nothing should be paid for it. *Cousens v. Paddon* (i) is to the same effect. This plea is also bad for duplicity. It contains several answers to the declaration, either of which would be sufficient. The effect of this is, that the plaintiffs have great difficulty in framing their replication, because by selecting one of the allegations, they would be taken to have admitted the rest. The replication *de injuriâ* would not have been appropriate, because that is only applicable in assumpsit, when the plea admits the contract, and excuses its non-performance. *Whittaker v. Mason* (k). *Griffin v. Yates* (l).

*Gale, contra.*—First, as to the demurrer to the thirteenth plea. The plaintiff might clearly have replied *de injuriâ*; or, if he had traversed one of the facts, the whole plea would have been in issue. Nor is the plea bad, as amounting to *non-assumpsit*. It admits that the plaintiff has a *prima-facie* case, and then shows other circumstances which prevent him from recovering in the action. In *Gregory v. Hartnoll* (m), and the cases which have been cited on the other side, there was no such admission; there is nothing in the new rules of pleading to prevent the defendant from giving colour to the plaintiff's title, and afterwards avoiding it, *Carr v. Hinckliff* (n).

(a) Cowp. 729.

(b) 2 Bing. N. C. 722. 2 Hodges, 78.

(c) 2 Bing. N. C. 732. 2 Hodges, 42.

(d) Since reported. 2 Mee & Welsby, 31.

(e) Cowp. 37.

(f) 1 Term Rep. 56.

(g) 1 Mee and Welsby, 333.

(h) 1 Mee and Welsby, 352.

(i) 2 Cr. M. and R. 547. 1 Gale, 365.

(k) 2 Bing. N. C. 359. 1 Hodges, 321.

(l) 2 Bing. N. C. 579. 1 Hodges, 387.

(m) 1 Mee and Welsby, 183.

(n) 4 Barn. and Cres. 547. See Cal. t. Lesouef, 2 Hodges, 75.

*Secondly*, The eighth plea contains an answer to the action, as it sets out a contract which is prohibited by stat. 14 Geo. 3, c. 48. The preamble recites that "it hath been found by experience that the making insurances on lives, or other events, wherein the assured shall have no interest, had introduced a mischievous kind of gambling." And this case is within the mischief which it was intended to remedy. *Atherfold v. Beard* (a) was an action upon a wager, whether the *Canterbury* collection of the duties upon hops for the year 1786 would amount to more than the collection for the preceding year; and it was held to be illegal because it was against the sound policy of the kingdom. *Buller, J.*, was inclined to go further, and said, "If it were necessary to have recourse to it, I incline to think, with the opinion of this Court and that of the Common Pleas, that the Stat. of 14 Geo. 3 would reach the present case. For though the statute speaks only of policies, yet I think it may extend to cases like the present. For either the Courts must restrain that act of parliament to such cases as are in form of policies, which would entirely repeal the statute, or, by pursuing the spirit of the act, extend it to all cases. I think the latter is the true construction; for a policy is nothing but a promise, and it would be strange to determine that the party might do the same thing in one form, which the statute has expressly prohibited to be done in another." In *Good v. Elliott* (b) the same learned judge expressed a similar opinion upon the construction of this statute. *Paterson v. Powell* (c) decided that an engagement to pay a certain sum in case *Brazilian* shares should be done, at a certain sum, on a certain day, and subscribed by several persons, was a policy of insurance within the meaning of the statute.

*Thirdly*. This wager is illegal at common law. It has often been decided that wagers which have a tendency to produce public mischief, or inconvenience, are illegal. The authorities are all collected in *Gilbert v. Sykes* (d). That was an action on a wager, by which the defendant received from the plaintiff 100 guineas, in consideration of paying the plaintiff a guinea a day as long as *Napoleon Buonaparte* should live, which bet arose out of a conversation upon the probability of his coming to a violent death, by assassination or otherwise. *Ellenborough, C. J.*, said, "This wager arose out of a conversation respecting the probability of *Buonaparte's* assassination; and these parties were not acting upon any remote speculation, when one of them thought that the mischief which was to destroy his life would happen within a hundred days from that time. If the wager in its terms had been upon the probability of a person's assassination within that period, I should not have considered such a question as proper to be tried in the form of a wager, which went to give any person an interest in the perpetration of so enormous an offence, and it matters little that this consideration was only an inducement to the bet more in the form of an annuity; the very computation of the price of such an annuity, little more than three months' purchase, shews that they contemplated a violent termination of the life. Upon the whole, therefore, not without some degree of doubt whether Mr. Justice *Buller* was not right, in saying that no wagers ought to be sustained where the parties have no special interest in the subject-matter; at any rate, where the subject-matter of the wager has a tendency injurious to mankind, I have no doubt in saying that

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(a) 2 T. Rep. 610.

(b) 3 T. Rep. 701.

(c) 9 Bing. 320.

(d) 16 East, 150.

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it ought not to be sustained." So here the consequence of contracts like the present may possibly give the parties an interest in interfering mischievously with the affairs of Spain, a nation at amity with this country. They may lead to such transactions in the funds of that State, as would materially affect the rate of exchange, and cause embarrassment in her financial concerns.

TINDAL, C. J.—The question before us is, whether the contract stated in this declaration is either bad at common law or under stat. 14 Geo. 3, c. 48. Unless we are prepared to decide contrary to *Good v. Elliott (a)*, we cannot say that this is a wager which is illegal at common law. Wagers are not illegal except in particular cases; one of those cases is, whenever the wager is likely to be destructive to the interests of this country, or of any foreign country, but I am unable to see that the natural and necessary consequence of this contract is to bring it within that exception. I see therefore no ground for holding this contract to be bad at common law. As to the statute 14 Geo. 3, c. 48, that is not applicable to the case of a wager between one man and another; the object of that statute was to prevent gambling speculations, by parties who put their names to policies of insurance in which the assured had no interest. This contract is not therefore illegal under that statute. The thirteenth plea appears to me to be bad as amounting to the general issue. It states, that the money which the plaintiffs seek to recover arose out of a certain contract which is set out in the plea; and it states that there was a condition to be performed by the plaintiffs, which they neglected to perform. What is this but pleading non-assumpsit? Our judgment must be for the plaintiffs.

PARK, J.—As to the principal point, unless we were disposed to overrule *Good v. Elliott (a)*, we could not hold this contract to be void at common law. No ground of immorality or impolicy has been shewn to warrant the Court in saying that this contract is illegal. With respect to the 14 Geo. 3, c. 48, I admit that the preamble is somewhat comprehensive, but it ought not to control the act itself, and that applies only to policies of insurance wherein the person on whose account such policy shall be made shall have no interest; and it goes on to say, that "every assurance" made contrary to the act shall be void. These words have a specific meaning, and by reference to the following sections, it is evident that a policy must be the foundation of the gaming. In *Good v. Elliott*, a second point was determined upon the construction of this statute; and the majority of the judges held that its provisions must be restricted to wagers relating to policies of insurance. I was not in the court when *Paterson v. Powell (b)* was decided: that was the case of a policy, and I fully concurred in that decision. On the other point relating to the thirteenth plea, I entertain no doubt.

VAUGHAN, J.—I am of the same opinion. *Good v. Elliott (a)* was very much discussed; it stood over for judgment, and the question was also discussed whether the statute 14 Geo. 3, c. 48, was applicable. That case has been acted upon ever since, and it is well established that wagers are in general

legal. It is observed by Mr. J. Grose, in the course of his judgment, that if gaming contracts were illegal at common law, the 14 Geo. 3, c. 48, would have been unnecessary.

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Judgment for the Plaintiffs.

DEVAS & an<sup>r</sup>. assignees of Bowring & Garard, Bankrupts,  
v. VENABLES and another.

**TROVER**, to recover certain goods, the property of the bankrupts; and a second count, stating the goods to be the property of the assignees. No question was raised on the four first pleas. The fifth plea stated that before the date of the fiat in bankruptcy against the bankrupts, the said bankrupts (the defendants not then having any notice of any act or acts of bankruptcy before that time or then committed by the bankrupts, nor then having any notice of any claim, right, or title of the plaintiffs as assignees, to the said goods and chattels) sold to the defendants, and the defendants then purchased of the bankrupts the said goods and chattels then in their possession, at and for divers sums of money amounting in the whole to a certain large sum of money, to wit, &c. And the defendants not then having any notice of any act of bankruptcy by the said bankrupts before that time or then committed, nor then having any notice of any claim, right, or title of the plaintiffs, as assignees, to the said goods and chattels, really and *bonâ fide* paid to the said bankrupts the said sum of money, as and for the price and purchase money of the said last-mentioned goods and chattels; which said sum had not, either before or after the commencement of the suit, been repaid by the bankrupts or by the said plaintiffs, as assignees, to the defendants. And the defendants, upon such purchase and payment of the said goods and chattels, then had and received the said goods and chattels, and had kept and detained, and still kept and detained the same in their possession by reason thereof; and the defendants, by reason of the said premises, had a claim and lien on the said goods and chattels for the said monies paid by them; and the defendants had detained, and still detained the said goods and chattels, for and by reason of the said claim and lien, as they lawfully might for the cause aforesaid, which was the said conversion in the said declaration mentioned;—concluding with a verification.

**Replication.**—That, upon the said sale and purchase in the said plea mentioned, the said bankrupts, fraudulently, and with intent to defeat and defraud their creditors, and in contemplation of bankruptcy, sold to the defendants the said goods and chattels at and for much less than the fair and proper prices and value thereof, to wit, at and for one half of the fair and proper prices and value thereof, and in a secret and clandestine manner, and otherwise than in and according to the regular and ordinary and tradesmanlike course of trade and dealing with respect to such goods and chattels, as the said goods and chattels so sold and purchased as aforesaid; of all which the defendants, at the time of such sale and purchase, and of the said payments in the said plea mentioned, had notice; *without this*, that the said payments in the said plea mentioned, or any of them, were really and *bonâ*

Jan. 14th.  
A. and B. who were traders in embarrassed circumstances, directed one of their shopmen to remove large quantities of goods to his lodgings and to sell them at 25 per cent. under prime cost. The shopman called on the defendants and offered the goods for sale, without disclosing the names of his employers, but stating that the owners were in want of money. The defendant called at the lodgings and made several large purchases, paying the shopman for each parcel in cash and deducting the discount. A fiat in bankruptcy issued, and the assignees brought trover to recover these goods. The jury found that the bankrupts intended to defraud their creditors, and that the defendants had not made such inquiries as honest and prudent men would have done: *Held*, that the assignees of the bankrupts were entitled to recover back the goods sold both before and after the commission of the act of bankruptcy, and that the case was within the 82nd sec. 6 Geo. 4, c. 16.

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*fide* made by the defendants to the bankrupts in manner and form, &c. (a)  
Conclusion to the country, and issue thereon.

At the trial before *Tindal*, C. J., at the *Guildhall* sittings after last *Michaelmas* Term, the following facts were in evidence:—The bankrupts were linen-drappers, and carried on an extensive retail business in *London*. In *September*, 1835, they directed *Kirby*, one of their shopmen, to take lodgings in *Goswell-road*, and large parcels of goods were removed from the shop to these lodgings, which consisted of a first floor and a kitchen, for the purpose of being secretly sold. *Kirby* then called upon the defendants, who were linen-drappers, carrying on business in partnership at *Whitechapel*, and represented to *May*, one of the partners, that he had a large quantity of goods to sell at a very cheap rate. *May* went to the lodgings and examined the goods, and, on the 31st *October*, agreed to purchase a parcel to the amount of 319*l.* 10*s.*, at 25 per cent. under the invoice price. *Kirby* stated that he was not the owner of the goods, but that he was selling for parties who wanted cash, but he did not disclose their names. The goods were sent to the defendants early in the morning, and *May* then paid *Kirby* the amount in cash, deducting the discount of 25 per cent.

Several other purchases were made by *May* under circumstances similar to the above; and upon one occasion *May*, upon seeing the invoice without the name of a seller, said to *Kirby*, "Come, shove us in the name of a seller:" whereupon *Kirby* inserted the words "Bought of *John Kirby*." The cost price of the goods was marked on each parcel in the usual manner, and on some of the last parcels, the name of the street, in which the bankrupts resided, was visible.

These sales took place at the under-mentioned dates, and the invoices and sums paid upon each parcel were as follows:—

|                | Date of Invoice.    | Amount of Invoice. | Amount paid, less discount. |
|----------------|---------------------|--------------------|-----------------------------|
| 1st sale . . . | 31st Oct., 1835 . . | £319 10 . .        | £236 5                      |
| 2nd sale . . . | 2nd Nov. . .        | 273 10 . .         | 200 0                       |
| 3rd sale . . . | 6th Nov. . .        | 306 2 . .          | 220 0                       |
| 4th sale . . . | 16th Nov. . .       | 210 8 . .          | 157 0                       |
| 5th sale . . . | 16th Nov. . .       | 15 12 . .          | 15 12                       |
|                |                     | £1125 2            | £828 17                     |

*Kirby* and the bankrupts were in collusion together to defraud the creditors of the latter, and they made large purchases upon credit at about the period of the above sales.

On the 1st *December*, 1835, a fiat in bankruptcy issued against the bank-

(a) By 6 *Geo.* 4, c. 16, sec. 82, it is enacted, "That all payments really and *bond fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, by any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bond fide* made, or which shall

hereafter be made, to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt, had not at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

rupts, upon an act of bankruptcy committed on the 6th November, and the assignees brought this action to recover the value of the goods thus purchased by the defendants. The jury found a verdict for the plaintiffs, damages 930*l*.

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*Bompas*, Serjt., moved for a rule *nisi* to reduce the damages to the amount of the sales which took place subsequent to the act of bankruptcy. *Ward v. Clarke* (a) was a case like the present in many of its circumstances, and Lord Tenterden, C. J., there observed, "Where there is an unknown act of bankruptcy, and transactions have taken place *bonâ fide* in the ordinary course of dealing, it appeared to me unjust to vitiate these transactions on the ground of a fact unknown to the party, and I accordingly considered, in a decided case where goods had been bought in the usual way in a shop, that the transaction was valid. The Court afterwards confirmed that decision (*Cash v. Young*, 2 B. & C. 413). The question, therefore, seems to me to be, not whether the purchase by the defendants was fraudulent, but whether it was in the ordinary course of trade and dealing. In considering that, you may look to the antecedent transactions between the parties, although I think that these cannot be impeached in the present action; and from them it appears that the defendants have several times bought from the bankrupts at very low prices." In accordance with this doctrine, the mere sale of the goods for less than the full price, is not of itself sufficient to invalidate the sale, but some fraud must appear. *Baxter v. Pritchard* (b). When men in embarrassed circumstances sell goods at a reduced price for the purpose of obtaining ready money, it only raises an impression in the purchaser's mind that the seller is desirous of raising money quickly; but it does not necessarily follow that the purchaser must be acquainted with the seller's intention of defrauding his creditors, and here the defendants knew nothing whatever about the bankrupts. [*Tindal*, C. J.—Suppose a purchaser shuts his eyes, and is determined not to know any thing about the real owner? Here the defendants, by making a little inquiry, could have ascertained to whom the goods belonged.] The name of the street where the bankrupts carried on their business did not appear on the parcels of goods which were sold before the act of bankruptcy was committed. And in the same case of *Ward v. Clarke*, it was held that transactions which occurred before the act of bankruptcy, and before the petitioning creditor's debt occurred, could not be impeached. A question also arises on the construction of sec. 82, 6 G. 4, c. 16. The issue is taken on the averment that the payments were not really and *bonâ fide* made by the defendants to the plaintiffs. Here there was no doubt but that the payments were really and *bonâ fide* made, and that being so, it is immaterial whether the sale was fraudulent. The word sale does not appear in the section, and seems to have been studiously omitted, and it was the intention of the Legislature that the assignees should not recover the goods, and also retain the payments made to the bankrupts in respect of them. The former stat. 46 G. 3, c. 135, sec. 1, protects "all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with, any bankrupt," *bonâ fide* made or entered into more than two months before the commission.

TINDAL, C. J.—This motion only seeks to retain the amount of the pur-

(a) 1 M. & Mal. 497.

(b) 1 Ado. & Ellis, 436.

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chases made before the act of bankruptcy, as it is admitted that the assignees are entitled to a verdict upon the transactions which occurred after the act of bankruptcy. The question which was left to the jury arose principally upon the fifth plea, upon which the precise issue is, whether the payments were really and *bond fide* made by the defendants to the bankrupts, in manner and form as in the plea alleged. It is contended for the defendants, that the late Bankrupt Act has altered the law affecting this question. I thought at the trial that the words "really and *bond fide*" did not import the same thing; if it were so, the words "*bond fide*" would not have been added; and it seemed to me that the way was to consider whether the payments were made honestly and fairly in the course of an honest transaction, on a *bond fide* contract. I told the jury that this would depend upon two points: first, whether the bankrupts make these sales with intent to defraud their creditors, and the jury found that they did; secondly, I asked them whether the defendants had the knowledge, or the means of knowledge, of the circumstances within their reach, so that men of common prudence would have made inquiries. I advised the jury to look narrowly into the evidence upon this point, and I left it to them much in the same way that I should have left the evidence in a criminal case. The jury found their verdict for the plaintiffs, and I presume that they supposed that enough had transpired to put a prudent and honest man upon his guard, and I entirely concur in their verdict. The case turned principally on the evidence of the witness *Kirby*, who appears to have been concerned in a wicked scheme to enable the bankrupts to make a purse; but it did not appear that the defendants were acquainted with that fact. This witness stated that he took lodgings and deposited goods belonging to the bankrupts in two upper rooms and the kitchen; the goods were removed by a stranger to the lodgings at an early hour in the morning. He then called upon *May*, one of the defendants, and told him he had a lot of goods to sell under price; *May* afterwards came to the lodgings and agreed to buy a parcel of the goods at 25 per cent. under the cost price. The witness informed *May* that the goods were not his own. It appears that the parcels were sent to *May's* house between seven and eight o'clock in the morning, when *Kirby* was paid for them. A second purchase, under similar circumstances, took place a few days afterwards, which was followed by other transactions, and some of the goods had the wholesale and retail marks appended to them. Under these circumstances, I am by no means dissatisfied with the finding of the jury.

PARK, J.—I am clearly of opinion that the verdict was right.

VAUGHAN, J.—The first question is, whether the bankrupts intended to commit a fraud on their creditors? It is impossible to doubt but that such was their intention. As to the construction of the statute, I agree in the opinion which my Lord Chief Justice has expressed.

Rule refused.

Com. Pleas.  
Jan. 1st.

## DOE, d. THRING, v. ROE.

**CHANNELL** moved for judgment against the casual ejector. The notice at the foot of the declaration required the tenant to appear in *Michaelmas* Term last, and judgment might have been obtained against him in that Term. In the Court of *King's Bench* the rule is, that under such circumstances this motion may be made in the Term following the Term which is stated in the notice.

Where a declaration in ejectment directed the tenant to appear in *Michaelmas* Term, but judgment against the casual ejector was not moved until *Hilary* Term, the rule for such judgment is *nisi* only.

**TINDAL, C. J.**—The party may have searched the office, to see if judgment was obtained in *Michaelmas* Term, and finding that it was not, he may suppose the proceedings were at an end. You may take a rule *nisi*.

Rule *nisi* granted (a).

(a) The rule is similar in the *Exchequer*. See *Doe d. Reeve v. Roe*, 1 Gale 15.

## Ex parte STEVENS.

**TALFOURD**, Serjt., moved that the officer of the Court should receive the certificate of an acknowledgment, made by a married woman, under stat. 3 & 4 Wil. 4, c. 74, sec. 85. The acknowledgment was taken in 1834, and the certificate and affidavit of the due taking were sent from *Norfolk* to *London* to be filed; but in consequence of an informality in the proceedings, they were returned to the country, and in the same year the acknowledgment was regularly taken, but through inadvertence, the documents were mislaid in the attorney's office, and had remained there until the present time. The parties, who were all alive, were now desirous that the certificate and affidavit should be filed, in pursuance of the statute.

An acknowledgment by a married woman was duly taken, but through inadvertence the parties did not send the certificate and affidavit to be filed, until two years afterwards, when the Court allowed them to be filed.

*Per Curiam*. Under the circumstances which have been stated, the certificate and affidavit may be filed.

## PHILIP v. ARDEN.

**HODGES** moved for judgment as in case of a nonsuit. The plaintiff had given notice of trial for *Hilary* Term, 1836, but having made default, the defendant moved for the costs of the day for not proceeding to trial, which were duly paid; but the plaintiff had not since taken any further steps to bring the cause to trial. It now appeared, by affidavit, that notice of the present motion had been given to the plaintiff's attorneys, and that they stated, in reply to an inquiry whether they intended to instruct counsel, that they did not intend to oppose the motion, but that the defendant's attorney might make the rule absolute.

Jan. 31st.  
After the defendant had moved for the costs of the day against the plaintiff for not proceeding to trial, and three terms having again elapsed without any notice of trial, the defendant gave the plaintiff's attorney notice that he intended to apply for judgment as in case of a nonsuit; the attorney said that he should not oppose the motion. Under these circumstances the Court granted a rule absolute for judgment as in case of a nonsuit.

**TINDAL, C. J.**—Under these circumstances, you may take a rule absolute.

**PARK, J.**, and **VAUGHAN, J.**, concurred.

Rule absolute (a).

(a) See *Mosley v. Clarke*, 2 Dow. P. C. 66. *Whalley v. Fellowes*, 1 Hodges, 77.



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Jan. 27th.

## DOE d. STONE v. ROE.

In moving for judgment against the casual ejector, the affidavit stated, in the usual terms, that the deponent had served the tenants in possession of the premises, with a true copy of the declaration in ejectment; but instead of shewing that the declaration and notice had been read over and explained to them, it was stated "that the tenants having expected to be served with the said proceeding, expressed their knowledge of the intent and meaning of the declaration and notice."

**R. V. RICHARDS** moved for judgment against the casual ejector. The affidavit stated, in the usual terms, that the deponent had served the tenants in possession of the premises, with a true copy of the declaration in ejectment; but instead of shewing that the declaration and notice had been read over and explained to them, it was stated "that the tenants having expected to be served with the said proceeding, expressed their knowledge of the intent and meaning of the declaration and notice."

**TINDAL, C. J.**—I think that is sufficient.

Rule granted (a).

(a) See *Doe d. Doumes v. Roe*, 1 Har. & W. 671.

## NORRIS v. SALOMONSON.

Jan. 34th. Where a witness met the drawer of a bill at the theatre the evening that it became due, and asked him whether he had heard of the dishonour of the bill, and he replied that he had, and intended to call and pay it, it was held that the defendant could not object that he had no notice of the dishonour of the bill.

**ACTION** on a Bill of Exchange by the indorsee against the drawer.—Plea, that the defendant had received no notice of the dishonour of the bill. At the trial before Mr. Serjeant *Arabin*, at the *Sheriff's* Court in *London*, a witness was called, who stated, that on the evening of the day on which the bill became due, he met the defendant at the theatre, when he asked him if he had heard of the dishonour of the bill? He replied, that he had received a very civil letter upon the subject of the dishonour, and that he should call and pay the bill. The witness could not recollect the precise words which were used by the defendant. The learned judge was of opinion that this was sufficient proof of the notice of dishonour, and a verdict was found for the plaintiff.

**Gurney** moved to set aside the verdict, and to enter a nonsuit, on the ground of misdirection. He submitted, upon the authority of *Hartley v. Case* (a), that there was no evidence to prove the notice of dishonour.

**TINDAL, C. J.**—This comes within that class of cases where strict notice of dishonour is waived by the defendant's own conduct (b). I think we ought not to disturb the verdict.

The other Judges concurred.

Rule refused (b).

(a) 4 Barn. & Cress. 339.

(b) See *Phipson v. Kneller*, 4 Cowp. 283.

## POWER v. HORTON.

Jan. 28th. The Court refused to grant a new trial in the Sheriff's Court, upon the ground that the under-sheriff refused to allow the defendant's attorney to cross-examine some of the plaintiff's witnesses, it appearing that the cross-examination was unnecessary. *Semble*, that the Court will not require an under-sheriff to make an affidavit of circumstances which occurred at the trial.

**THOMAS** obtained a rule *nisi*, calling upon the plaintiff to shew cause why there should not be a new trial. The action was brought to recover the amount of a builder's bill, and at the trial, before the under-sheriff of

The Court refused to grant a new trial in the Sheriff's Court, upon the ground that the under-sheriff refused to allow the defendant's attorney to cross-examine some of the plaintiff's witnesses, it appearing that the cross-examination was unnecessary. *Semble*, that the Court will not require an under-sheriff to make an affidavit of circumstances which occurred at the trial.

*Warwick*, a verdict was found for the plaintiff, for 5*l.* 16*s.* 6*d.* The ground upon which the rule was moved, was that the under-sheriff refused to allow the defendant's attorney to cross-examine the plaintiff's witnesses.

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*Powers*  
*v.*  
*Horton.*

*Gale* shewed cause, upon an affidavit made by the plaintiff's attorney and one of the witnesses, which stated that the under-sheriff had refused to allow the defendant's attorney to cross-examine certain labourers item by item, as to the reasonableness of the plaintiff's charges, these witnesses being examined for the mere purpose of proving that the work had been done; the reasonableness of the charges was proved by surveyors who had been subjected to cross-examination. It also appeared that the defendant called witnesses, who were examined as to the unreasonableness of the charges. The under-sheriff, upon an application being made to him, expressed his willingness to make an affidavit of the facts which occurred at the trial, if he should be required by the Court to do so.

*Thomas* was heard in support of the rule.

*TINDAL, C. J.*—No doubt, if the under-sheriff misconducted himself at the trial, the Court would interfere, but this is not a case of that description. It seems that the under-sheriff did prevent some cross-examination, but we must allow him to exercise some discretion in the management of a cause. Here, it appears that witnesses were called for the defendant, and the plaintiff nevertheless obtained a verdict. The rule must be discharged.

*PARK, J.*—I am of the same opinion. The under-sheriff would frequently be placed in a disagreeable situation if he were required to make an affidavit of the facts which occurred at the trial.

*VAUGHAN, J.*, concurred.

Rule discharged.

### BEESLEY'S BAIL.

*ANDREWS*, Serjt., opposed the bail upon the ground that one of the bail was the drawer of the bill of exchange, the subject of the action, defendant being the acceptor. He contended that the plaintiff, as indorsee, already had the drawer's security, he being liable to be sued on the bill.

*Jan. 11th.*  
In an action against the acceptor of a bill of exchange, it is no objection to bail that he is the drawer of the bill.

*W. H. Watson*, in support of the bail.—The bail states, in his affidavit, that he is worth the sum required, over and above all his just debts, which includes his liability on this particular bill. There is no principle upon which to found this objection: it differs from the case of an acceptor becoming bail for the drawer, because the acceptor is there primarily liable to pay the bill.

*BOSANQUET, J.*, referred to *Harris v. Manley* (a), *Mitchell's* bail (b), *Barnesdall v. Stretton* (c), and other cases referred to in *Arch. Prac.*, 168, 3rd edition.

*Cur. adv. vult.*

(a) 2 Bos. & Pul. 526.  
(c) 2 Chitty Rep. 79.

(b) 1 Chitty Rep. 287.

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*BAIL.*

On a subsequent day, *Park, J.*, intimated that the objection could not be supported. The case of *Barnesdall v. Stretton (a)* was decided upon the ground that the drawer was liable, as the drawer of another dishonoured bill.

Bail admitted (b).

(a) 2 Chitty Rep. 79.

(b) See also *Anonymous*, 1 Dow. P. C. 183. *Cross v. Williams*, 1 Tyr. 531.

## HENRY v. BURBIDGE.

*Jan. 28th.*  
*In assumpsit by*  
*the indorsee*  
*against the draw-*  
*er of a bill, if the*  
*declaration does*  
*not allege a prom-*  
*ise to pay, it is*  
*bad on special*  
*demurrer.*

**DEMURRER** to a declaration on a bill of exchange. The declaration stated, that the defendant had been summoned to answer the plaintiff by virtue of a writ issued on the 4th day of *November*, 1836. For that whereas the defendant, on the 15th *March*, 1836, made his bill of exchange in writing, and directed the same to one *Pearson*, and thereby required *Pearson* to pay to the order of the defendant 29*l.* 18*s.* 10*d.* four months after the date thereof, which period has now elapsed, and the defendant then indorsed the said bill to the plaintiff; that *Pearson* did not pay the said bill, although the same was presented to him on the day when it became due, whereof the defendant then had notice. And whereas also the defendant, on the 1st *November* last, was indebted to the plaintiff in 30*l.* for the price and value of goods then sold and delivered by the plaintiff to the defendant and at his request, and in 30*l.* for money found to be due from the defendant to the plaintiff on an account then stated between them. And the defendant afterwards, on the day and year last aforesaid, in consideration of the last-mentioned premises respectively, then promised the plaintiff to pay the said last-mentioned several monies respectively to the plaintiff on request. Yet the defendant had disregarded his promises, and had not paid any of the said monies or any part thereof respectively, to the damage, &c.

*Demurrer* to the first count, which stated the following causes of demurrer: that it did not appear by the said first count that the bill therein mentioned became due or payable before the commencement of the suit; and that the words "which period has now elapsed," contained in that count, have reference to the date of the declaration, and not to the issuing of the writ; also, that the said first count contained no promise by the defendant to pay the monies therein mentioned, or any part thereof.

*Whitehurst* for the defendant abandoned the first ground of demurrer upon the authority of *Owen v. Walters (a)*. As to the second point, this is an action of assumpsit, and it is necessary to allege a promise made by the defendant. [TINDAL, C. J.—It has been held, that the statement of an agreement between the parties imports a promise.] That was decided in *Mountford v. Horton (b)*, but there the declaration stated, "that at the time of making the promise and undertaking thereafter mentioned," divers goods were for sale, and then an agreement was stated between the parties. *Starky v. Cheeseman (c)* may be relied on on the other side. There in an action

(a) 5 Dow. P. C. 324.

(b) 2 Bos. & Pull. N. R. 62.

(c) 1 Lord Raym. 538. 1 Salk. 123.

against the drawer of a bill, it was objected in arrest of judgment, that it was not stated in the declaration that the defendant promised to pay the money, and it was held that it was not necessary to lay an actual promise. That would be an authority in the present case, if this were an application to arrest the judgment, but the objection is now raised on special demurrer, and the plaintiff must shew his declaration to be strictly regular, and an assumpsit must appear. The rule T. T. 1 W. 4, which gives the forms of counts on bills of exchange, contains the following directions:—"If the declaration contains one or more counts against the maker of a note, or acceptor of a bill of exchange, it will be proper to place them first in the declaration; and then in the general conclusion to say, promised to pay the said last-mentioned several monies respectively." From the framing of this declaration, it would seem as if this direction had been improperly observed in the present instance: but the forms which are given contain a promise to pay by the maker.

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*Martin, contra.*—Nothing depends upon the forms given by rule T. T. 1 W. 4, as they were issued merely for the purpose of diminishing the prolixity of pleadings, and were intended only as illustrations for framing pleadings in a more concise manner. *Starkey v. Cheeseman* (d) is directly in point. In *Bayley on Bills* (e), it is said, that the averment of a promise to pay is unnecessary, "in an action against either the acceptor of a bill or the maker of a note, and it may be doubted whether it is essential in any other." In *Wegsloff v. Keene* (f), which was an action against an acceptor, *Fortescue, J.* remarks:—"There is another answer to the objection, and that is, that the plaintiff needed not set out any promise at all. *Louther v. Conyers*, which was upon a promissory note, and they had left out *super se assumpsit*, and yet it was held well enough, for the law raises a promise." It is difficult to see any reason on principle why the rule should be different, in an action brought against a drawer. The drawing as well as the accepting of a bill imports a promise to pay.

TINDAL, C. J.—This being an action of assumpsit against the drawer of a bill of exchange, a promise to pay ought in strictness to be inserted in the declaration. Mr. Justice Bayley seems to have doubted whether it is necessary. *Starkey v. Cheeseman* (d) was decided after verdict, but it does not therefore follow that such an objection would not have been fatal on special demurrer. If the averment may be omitted in this case, I do not see why it may not be left out in a declaration for goods sold or money paid. In this case where the only proper form of action is in assumpsit, the promise ought to be stated.

PARK, J., and VAUGHAN, J., agreed.

Judgment for defendant.

(d) 1 Salk. 128. 1 Lord Ray. 538.  
(e) 5 ed. 408.

(f) Strange, 214.

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Jas. 25.

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*A.*, as principal, and *B.*, as surety, become jointly and severally bound to the plaintiffs; and the condition of the bond was, that *A.* should pay the first year's interest of the money lent, on the 1st March, 1833; and the third year's interest, with the principal sum, on the 1st March, 1835. *A.* did not pay the first year's interest until the 30th March, 1833. *B.*, the surety, became bankrupt in June, 1833, and obtained his certificate in August, 1833. *A.* not having paid the principal sum in March, 1835, *B.* was sued on the bond, and he pleaded his certificate in bar:—*Held*, that the bond was forfeited before the bankruptcy, and that the subsequent payment of the interest did not waive the default—that the debt was therefore proveable against the estate of *B.*, and that his certificate was a bar to the action.

THIS was an action on a bond for 400*l.*, which recited, that the master and wardens of the Skinners' Company had advanced to one *James Butler* the sum of 200*l.* according to certain trusts reposed in them, the defendant consenting to be surety for the repayment of the same;—and the condition of the said bond was such, that if the said *James Butler*, his heirs, executors, or administrators, should well and truly pay, or cause to be paid, unto the said master and wardens, their successors, or assigns, on the 1st day of *March* then next ensuing, the sum of 5*l.* of lawful English money, being the first year's interest on the said sum of 200*l.*, at the rate of 2*l.* 10*s.* per cent. per annum, and on the 1st day of *March*, 1834, the like sum of 5*l.* of like lawful money, being the second year's interest as aforesaid, and on the 1st day of *March*, 1835, the sum of 205*l.* of like lawful money, being the said principal sum of 200*l.* with the third year's interest as aforesaid; or in case the said *James Butler* should, during any part of the said term of three years during which he was to retain and hold the said sum of 200*l.* as aforesaid, fall into decay by riot or ill husbandry, or any dishonest or immoral conduct, then if the said *Francis Jones* (the defendant), his heirs, executors, or administrators, should well and truly pay, or cause to be paid, on demand, unto the said master and wardens, their successors, or assigns, the full sum of 200*l.* with interest for the same after the rate aforesaid, from the date of the above written obligation, or from the last day up to which the interest of the said sum of 200*l.* should have been paid, as the case should happen, then the above written obligation should be void, but otherwise should be and remain in full force and virtue. The declaration then stated, that although the said *James Butler* duly paid the said two several sums of 5*l.* each, being the first two years' interest as aforesaid, according to the said condition in that behalf, to wit, on the said 1st day of *March*, 1833, and 1st day of *March*, 1834; and although the day in and by the said condition appointed for payment of the said sum of 205*l.* elapsed long before the commencement of the suit, yet the said *James Butler* did not on the said 1st day of *March*, 1835, pay the said sum of 205*l.* according to the tenor and effect of the said condition in that behalf.—The defendant pleaded that *Butler* did not duly pay the interest which became due by virtue of the said writing obligatory and condition on the said 1st day of *March*, 1833, according to the form and effect of the said condition, but wholly neglected so to do, and therein failed and made default, whereby the said writing obligatory became forfeited; and that after the said writing obligatory so became forfeited as aforesaid, and before the commencement of the suit, to wit, on the 11th day of *June*, 1833, the defendant became bankrupt; and that the said debt in the declaration mentioned, and thereby demanded, became due and was payable, and the cause of action for or in respect thereof accrued to the plaintiffs before he, the defendant, so became a bankrupt as aforesaid.—Concluding to the country.

The plaintiffs joined issue, and by the consent of the parties the facts were stated for the opinion of the Court on the following

## CASE.

By bond of the 1st *March*, 1832, stated in the declaration, the said

*James Butler* and the defendant became jointly and severally bound to the plaintiffs in 400*l.*, subject to the condition stated in the foregoing pleadings. The sum of 200*l.* therein mentioned was advanced as therein expressed, to the said *James Butler*, who paid the plaintiffs the first year's interest, viz., 5*l.* on the 30th *March*, 1833, and the second year's interest, viz., 5*l.* on the 5th *April*, 1834, but he has not paid the sum of 205*l.* which was payable on the 1st day of *March*, 1835, according to the said condition, or any part thereof. The defendant, being a trader, committed an act of bankruptcy on the 10th *June*, 1833, and a commission of bankruptcy was duly awarded and issued against him on the 11th *June*, 1833, and he was thereon duly declared a bankrupt, and on the 24th of *August*, 1833, a certificate of his conformity was duly signed and allowed. After the 1st *March*, 1835, several applications for payment of the 205*l.* were fruitlessly made to *James Butler*, but no application was made to the defendant, as his surety, for payment of that sum until the 20th *May*, 1835, nor did the defendant receive any notice from the plaintiffs that they should look to him for payment of either the principal or interest before the last-mentioned day. The plaintiffs never proved, or claimed, or attempted to prove any debt whatever on the estate of the defendant under the commission issued against him. The question for the opinion of the Court was, "Whether the bankruptcy and certificate of the defendant bar the claim of the plaintiffs in the present action?"

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*J. Henderson* for the plaintiffs. — This is neither a debt due from the bankrupt at the time when he became bankrupt, nor a claim or demand made proveable by the 6 Geo. 4. c. 16, so as to be discharged by the certificate under the 121st section.

The distinction between a debt due from the bankrupt whether payable at the time of the bankruptcy or not, and a collateral engagement, as to which it was at the time of the bankruptcy doubtful, whether it would ever terminate in a debt, has been long established; *Ex parte Adney (a)*, *Alsop v. Price (b)*. It will be contended that the present case is distinguishable, on the ground that the bond had become forfeited before the bankruptcy. At the time of the bankruptcy nothing was payable; the first instalment payable on the 1st of *March*, 1833, having been already paid, and the other instalments not being payable till periods subsequent to the certificate. Admitting that *solvit post diem* could not have been pleaded to an action brought at the time of the bankruptcy, although all that was payable up to that time had really been paid, and that the lapse of the short time during which the principal delayed payment of the 5*l.* payable on the 1st of *March*, 1833, worked a forfeiture, still no capacity of proof on the surety's estate was acquired. The stat. of 8 & 9 W. 3. c. 11, s. 8, would have prevented the plaintiffs from recovering more than 1*s.* damages, for the breach which had taken place in non-payment on the very day, the sum then payable having been paid; and the judgment could not have been rendered available against the surety as to the sum now claimed, unless and until default was subsequently made by the principal in payment thereof. — If the *principal* had become bankrupt, there could be no question as to his discharge. As to him the sum now claimed was then *debitum in presenti, solvendum in futuro*. But from the surety, the amount

(a) Cowp. 460.

(b) 1 Doug. 160.

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was not then a debt nor even certain to become one. What could the plaintiffs have proved on the bankrupt estate of the surety? Not the penalty, for that was never proveable (21 Ja. 1, c. 19, s. 9). Not the amount due on the 1st March, 1833, for that had been already paid. Not the future amounts, for it depended on the future will and power of the principal to pay at the day, whether they ever would become debts from the surety. If proveable at all, they could only be proveable as contingent debts under the 56th section of the Bankrupt Act. There are no doubt cases of annuity bonds where a forfeiture antecedent to the bankruptcy has been held to confer a right of proof, for there, as observed by Lord Mansfield, C. J., in *Wyllie v. Wilkes* (c), "you may have a value set on your annuity and come in as a creditor under the commission." The present is clearly not an annuity bond, though an annual payment of interest is provided, *Winter v. Mauseley* (d). A forfeiture has never been held to render proveable a claim incapable of valuation. On the contrary, in the case of *The Overseers of St. Martin-in-the-Fields v. Warren* (e), a bastardy bond having become forfeited before the bankruptcy of the obligor, an action founded on subsequent breaches was held not to be barred by the certificate of the bankrupt. Lord Ellenborough observed that "this was a debt upon a contingency, and one too in its nature wholly incapable of valuation, and, therefore, in my opinion, not proveable under the commission. The case of an annuity is an exception to the general rule: there, indeed, the Courts have allowed the amount of the contingent debt to be valued and assessed; but there you may estimate the duration of life." So in *Clements v. Langley* (f), where, at the time of the bankruptcy, there had been a forfeiture by reason of the non-payment of certain interest, which was subsequently paid, the same distinction is recognised, and the judgment delivered by the judges there fully explains and supports this point of the plaintiff's case. Assuming that for the purposes of pleading the bond had become forfeited, the nature of the claim on the surety remained unchanged, and being contingent and incapable of valuation could not be proved.

That the contingency was such as could not be valued seems clear. How could the commissioner calculate the chances whether *Butler*, the principal, might or might not pay the sums to become payable in 1834 and 1835, or might sooner fall into decay and be called on for earlier payment according to the condition of the bond? An annuity has a tabular value. But by what process could the probability be measured in the present case? It was impossible for the commissioner to value the contingency on which the debt depended, and if it could not be valued it could not be proved. If any authority were wanting, a crowd of cases might be referred to, to shew that a claim which at the time of the bankruptcy was incapable of being ascertained in amount, is not barred by certificate, on afterwards becoming absolute. *Atwood v. Partridge* (g), *Boorman v. Nash* (h), *Yallop v. Ebers* (i), *Thompson v. Thompson* (k). Where it is incapable of valuation it is incapable of proof: *Lancaster Canal Co. v. Dilworth* (l), *Ex parte Darre* (m), *Wentworth* (n), *Ex parte Marshall* (n), *Ex parte Tindal* was the subject

- (c) 1 Doug. 509.
- (d) 2 Barn. & Ald. 802.
- (e) 1 Barn. & Ald. 491.
- (f) 5 Barn. & Adol. 372.
- (g) 4 Bing. 209.
- (A) 9 Barn. & Crea. 145.

- (i) 1 Barn. & Adol. 698.
- (A) 2 Bing. N.C. 168. 1 *Hodges*, 225.
- (l) Montag. Rep. 27.
- (m) Montag. Rep. 121 & 297.
- (n) Montag. & Ayrton, 118 & 145.

of conflicting judgments (o), but was finally decided, on the ground that the contingency was capable of valuation (p), and that contingency was valued by an actuary (q).

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The same circumstance, viz. the incapacity of valuation, seems equally to shew that the amount could not be proved under the first part of the 56th sec. of the Bankrupt Act, by which the commissioners are required to ascertain the value, and admit the proof—" *Lex neminem cogit ad impossibilia*," and if the value could not be ascertained, the proof could not be admitted. But it will be said that the case is within the second part of the clause, and that the contingency having now happened, the creditor may now "prove in respect of his debt, and receive dividends with the other creditors, not disturbing former dividends." It may be doubted whether this second part of the clause applies to any debts, which if the contingency had not happened, would not have been proveable under the first part. Where the legislature intended to confer on claims incapable of valuation, at the time of the bankruptcy, the capacity of being proved when the contingency ceased, it has done so in express terms, as in the instances of bottomry and respondentia bonds, and policies of insurance, by the 53rd sec. *Ex parte Grundy* (r) may be cited, but there the present point was not, as the case is reported, noticed in any way, but it certainly was not taken for granted at the bar, but as is understood from a gentleman engaged in the case, was strongly urged, and on account of its not being decided, an appeal would have been brought, if it had been practicable in bankruptcy. *Ex parte Lewis* (s) is very shortly reported. It is there stated that the reasoning was the same as in *Ex parte Tindal* (o) before the Vice-chancellor, whose decision on this point was overruled by the Lord-chancellor on appeal (o), and not sustained on the final hearing (t). In other respects the decision in *Ex parte Lewis* rests on that of *Ex parte Grundy*, where the point was never noticed by the court. In some cases in the court of review, opinionous favoring to a certain degree the proposition, that debts not at the time of the bankruptcy capable of valuation are proveable when the contingency happens, have been expressed by the judges. Their judgment in the latest case of the sort viz. *Ex parte Simpson* (u), may be considered as embodying their views on this subject. Sir Thos. Erskine observes, "My opinion has always been, where the contingency on which the payment of a debt depends, happens before the declaration of a final dividend, and before the bankrupt has obtained his certificate, the creditor may and is bound, under the latter branch of the 56th sect., to come in and prove his debt under the commission, although at the date of the commission the debt was incapable of valuation." This, it should be observed, is a mere *obiter dictum*, the case being decided on another point.

Limited as the proposition is, in the words of the chief judge of review, to the case of debts becoming absolute before final dividend and certificate, it is needless in the present case to question his honor's dictum. Whether a final dividend had been declared before the 1st March, 1835, does not appear in the special case. The 109th section of the Bankrupt Act directs the decla-

(o) Montag. & M'Arthur, 415 & 422.

(p) 8 Bing. 402.

(q) Montag. & Bligh, 235.

(r) Montag. & M'Arthur, 293.

(s) Montag. M'Arthur, 426.

(t) 8 Bing. 402.

(u) Montag. & Ayrton, 563.



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ration of a final dividend (unless any part of the estate be outstanding) in eighteen months after the commission. Here, when the contingency ceased, viz. on the 1st *March*, 1835, more than twenty months had elapsed since the fiat. No dividend can absolutely be considered as final, except one that pays all the creditors in full. But in the opinion of the chief judge of bankruptcy, the debt, to become capable of proof, must have become absolute before certificate as well as final dividend. Here the certificate was granted eighteen months before the contingency ceased. The defendant therefore must go a great deal further than this opinion of his honor does. He must contend that a debt, incapable of proof, by reason of its contingent nature, till long after certificate, is, whensoever the contingency may cease, proveable so as to be barred by the certificate. In the present case eighteen months had elapsed; suppose eighteen years had passed away, is the creditor who at the end of that time claims a debt which he never could claim before, to be told to look for payment to a fund which is already paid away to others, and in which while it existed he could not participate? Is he then to be invited, in the language of the clause, to "prove his debt, not disturbing former dividends?" Such a conclusion would be inconsistent with the spirit of the Bankrupt Act, which plainly contemplates the right of the creditors to share in the bankrupt's estate, and the right of the bankrupt to exemption from future liability, as correlative; and there is nothing in the letter of the act to constrain the Court to adopt such a construction.

*Fish, contra.*—The only question is whether there was a debt due from the defendant to the plaintiffs at the time of the bankruptcy. If there was, the defendant is clearly entitled to the judgment of the Court, because it ought to have been proved against the estate, and that not being done, the defendant's certificate is a bar to the action. The bond became absolutely forfeited on the 1st *March*, 1833, when default was made in the payment of the interest then due, according to the condition. The defendant became bankrupt in *June*, 1833, and obtained his certificate in the *August* following. Now the payment of the interest on the 30th *March* was not equivalent to payment on the day required. At common law payment of the principal and interest after the day mentioned in the condition was no discharge, and stat. 4 Anne, c. 16, sec. 12, therefore enacted, that if the obligor had, before action brought, paid to the obligee the principal and interest due by the condition of the bond, though such payment was not made strictly according to the condition, yet it should nevertheless be pleaded in bar of the action. But this bond is not within the protection afforded by that statute, but it falls rather within the provision of 8 & 9 W. 3, c. 11; and in *Murray v. the Earl of Stair* (r), *Holroyd*, J. said, "It is perfectly clear, that if this bond be within the 4 & 5 Anne, c. 16, it is not within the statute of 8 & 9 W. 3, c. 11," which opinion was recognized by *Tindal*, C. J. in *Smith v. Bond* (w).

If it were necessary to discuss the cases which have been decided on the 56th sec. of 6 Geo. 4, c. 16, the defendant would rely on *Ex parte Winchester* (x), *Perkins v. Kempland* (y), *Ex parte Tindal* (z), *Ex parte Lewis* (a), *Thompson v. Thompson* (b).

(v) 2 B. & Cress. 93.  
 (w) 10 Bing. 132.  
 (x) 1 Atkyns, 116.  
 (y) 2 W. Black. 1106.

(z) 8 Bing. 402.  
 (a) 1 Mont. & McArthur, 426.  
 (b) 2 Deacon & Chitty, 126.

*J. Henderson* in reply.—The forfeiture of the bond worked no change in the nature of the debt, for the purposes of proof. At the time of the bankruptcy, the non-payment until some days after the 1st *March*, 1833, of the 5*l*. then payable, might have sustained a judgment, but under that judgment payment could not have been enforced as to the sum now in question against the surety, unless and until default was subsequently made by *Butler*; and his assignees were not in a worse situation than himself. No action was in fact commenced; but even if a judgment had been obtained against the surety, the only consequence would have been that he would have become a surety on record, instead of a surety by specialty. The debt still remained as contingent as ever; the judgment left it still as uncertain as it was on the bond, whether *Butler* would pay the future sums at the day; in which event, the defendant never would have been liable on the judgment in that respect. If the technical circumstance of the forfeiture of the bond makes no difference, then the principles recognized and established in *Thompson v. Thompson* (c), govern the present case. There, as here, the contingency was incapable of valuation at the time of the bankruptcy.

To adopt the conclusions urged for the defendant must in one way or other lead to manifest injustice and inconvenience. If, on the bankruptcy, the plaintiffs were admitted to proof of the sum now claimed, making only a rebate of interest, then the creditors of the surety would be deprived *pro tanto* of payment, in favor of those who were not, and might never become creditors. If a claim might have been made, and the dividend postponed till the contingency ceased, then the creditors would be delayed till it was ascertained whether *Butler* could or should pay at the days appointed, or fall into decay, and be sooner called on for payment, or be discharged by the obligees, by giving time or otherwise. If the debt is held proveable under the second branch of the 56th sec., then the plaintiffs are deprived of their remedy against the surety, without having the opportunity of that participation in the estate of the bankrupt, which is the condition and price of the discharge of the bankrupt.

*TINDAL, C. J.*—The question in this case is, whether this debt was proveable against the estate of the defendant at the time of his becoming bankrupt. It is not necessary to consider the various cases which have been decided upon the 56th sec. of 6 Geo. 4, c. 16; for, upon the best consideration which I can give to this case, I think that in point of law the bond had become forfeited before the bankruptcy, and that the debt might have been proved under the commission. The two obligors are jointly and severally bound, as if separate bonds had been given: the condition is, that if *Butler* should pay the first year's interest on the 1st *March*, 1833, and the second year's interest on the 1st *March*, 1834, and the third year's interest together with the principal sum, on the 1st *March*, 1835, then the obligation should be void; but otherwise should remain in full force and virtue. It is stated in the case that on the 1st of *March*, 1833, *Butler* made default in payment of the interest, and, in a court of law, the bond thereupon became forfeited. If things had remained in this state until the 11th of *June* following, the date of the bankruptcy, it could not have been contended that the bond had not become for-

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feited. But it is contended for the plaintiffs, that in consequence of the first year's interest having been paid and accepted on the 30th of *March*, 1833, the legal effect of the default was thereby waived. I know of no principle of law to support that proposition. The very circumstance of the passing of the stat. 4 & 5 Anne, c. 16, shews that a plea of *solvit post diem* would be insufficient, and in *Com. Dig.* tit. "Accord" (A. 2), it is said, "So accord is no plea where a certain duty accrues by the deed merely: for a deed ought to be avoided by a matter of as high a nature. As in debt upon a bill or bond to pay money," citing 6 Co. 44 a. But the statute is only applicable when the principal and interest are paid together, and therefore this bond was void as against the obligors, because the event provided for did not take place. I am not prepared to say that a court of equity would not have interfered to prevent the party from proving the debt; I neither affirm it nor deny it. All that we are called upon to say is, that the legal construction of this condition is, that the bond became forfeited, and the penalty became the debt which was due, although only the money actually lent, minus the interest which was not due, would have been the amount proved against the estate. I am therefore of opinion that the debt being proveable, and it not having been proved, the certificate is a bar to this action, and our judgment must be for the defendant.

PARK, J.—I am of the same opinion. The case has been very ably argued, and at first I was inclined to think that this was a contingent debt. It is admitted that the bond was forfeited in *March*, 1833, and if at that time proceedings had been taken against the surety, the amount could have been recovered. What the Court of Chancery would have done I cannot say, but I think the bond being forfeited, the debt ought to have been proved under the commission, subject probably to a rebate of the interest which was not then due.

VAUGHAN, J.—Upon looking attentively at this case, I feel no difficulty in deciding it in favor of the defendant. The 121st sec. of the 6 Geo. 4, c. 16, directs that every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force concerning bankrupts, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission. That being so, the question is, whether this debt was proveable under the commission? The bond makes the first year's interest payable on the 1st *March*, 1833: default was made in that payment, as it was not paid until the 30th *March*, and the defendant became bankrupt on the 11th *June* following. Under these circumstances, it cannot be successfully contended that the default could be purged by a subsequent payment of the interest, and I am of opinion that this debt was proveable under the commission.

Judgment for the defendant.

DOE, *d.* THOMAS, *v.* WATKINS.

Com. Pleas.

Jan. 17th.

**EJECTMENT.**—At the trial of the cause at the last assizes at *Carlisle*, the lessor of the plaintiff, after having given the defendant notice to produce a deed, which he failed to do, produced an abstract which contained a recital of the deed, as secondary evidence of its contents; and called Mr. *Church*, an attorney, to prove that he had examined the abstract with the original deed. The circumstances under which the witness had seen these documents were these: One *Williams* had mortgaged the premises, sought to be recovered, to the defendant; and *Williams* being desirous of paying off the mortgage debt, his wife applied to *Church*, and inquired whether he could effect a transfer of the mortgage. *Church* mentioned the name of one of his clients, who had money to invest, but he requested to see an abstract of the title to the premises. *Williams* accordingly obtained an abstract from *Jones*, his own attorney, and *Church* examined it with the title-deeds, which were in the defendant's possession. He then discovered a defect in *Williams*'s title, and thereupon declined to proceed further in the business, and no money was advanced. *Church* did not make any demand upon *Williams* for his trouble in examining the deeds, &c. The lessor of the plaintiff in this action relied upon the defect in the defendant's title, which was thus discovered by *Church*.

Where an attorney who had money belonging to his clients, to invest on mortgage, examined the title of one who desired to borrow money on mortgage. It was held that the relation of attorney and client existed, and that the communication was privileged, although no money was lent, and the attorney made no charge for examining the title.

The counsel for the defendant objected that the witness having been employed by *Williams*, as an attorney, the communications between them were privileged. The learned judge received the evidence, but reserved the point. A verdict was found for the defendant, and a rule *nisi* for a new trial was obtained, by the lessor of the plaintiff, upon another question of law which had been reserved.

*Chilton* shewed cause.—This was clearly a confidential communication, and ought not to have been disclosed. In *Turquand v. Knight* (a), decided at Michaelmas Term in the *Exchequer*, it was held that if the communication made, related to a circumstance so connected with the witness's employment as an attorney, as that the character formed the ground of the communication, it was privileged from disclosure. Here the relationship of attorney and client existed. In *Doe, d. Shellard, v. Harris* (b), *Parke, J.*, said, "I am of opinion that the privilege applies to all cases where the client applies to the attorney in a professional capacity." And in a late decision in this court, *Taylor v. Blacklow* (c), the cases upon this subject were considered. Here the defendant was employed to raise money for the plaintiff, and he disclosed certain defects in the plaintiff's title, by which he sustained damage, and it was held that an action would lie against the attorney; and *Vaughan, J.*, observed, "I think that the contents of these deeds were a privileged communication, which the defendant could not have been compelled to disclose. The law has been laid down too narrowly on that head by the counsel for the defendant;" and *Tindal, C. J.*, intimated that he was of the same opinion at that point.

*J. Erans* and *E. V. Williams*, *contra*.—*Taylor v. Blacklow* (c) is distin-

(a) Since reported, 2 *Mee & Wel.* 98.

(c) 3 *Bing. N. C.* 235.

(b) 5 *Car. & P.* 593.

*Com. Pleas.*  
*DON, d. THOMAS,*  
*v.*  
*WATKINS.*

guishable, because there the client sustained special damage, and the relationship of attorney and client existed: but that is not so in the present case. The witness was attorney to the lender of the money, and *Jones*, who furnished the abstract, was *Williams's* attorney. And the decision in that case goes to this extent, that if the defendant had been a scrivener, he would have been liable to be sued. The real question is, whether this case comes within the dry rule of law which has been established, as to communications made to attorneys by their clients. It does not depend upon whether or not there has been a breach of confidence, and the term, "confidential" communication, is incorrect, because confessions made to clergymen, or others who are not of the legal profession, may be disclosed. Lord *Tenterden*, C. J., was of opinion that the privilege was limited to communications which related to a suit which had been or was about to commence (*d*), although in *Greenough v. Gaskell* (*e*), Lord *Brougham* was of opinion that the privilege was not so restricted. In *Sugden, Vend. & Pur.* (*f*), it is said that the privilege does not extend to communications from collateral quarters, although made to the attorney in consequence of his character of attorney; *Spenceley v. Schulenburg* (*g*). So here the application came from a collateral quarter, and the scrutiny of the title by the attorney was in his character of attorney to his client, who had instructed him to lend the money on security.

TINDAL, C. J.—The question in this case is, whether *Church* was speaking of a transaction in which he was engaged as an attorney. It appears that he had various sums of money to lend, belonging to his clients, and that he was applied to by Mrs. *Williams* for a loan of money, to enable her husband to pay off a mortgage. Now I cannot perceive how it can less be said that she consulted him as attorney, because he held the money as the attorney of other persons. It appears that *Church* desired to be furnished with an abstract, which was accordingly sent to him. This was the employment of one attorney by the borrower and lender, which is by no means an unusual occurrence, and I think the attorney ought not to be allowed to disclose information which is thus obtained. Suppose the transaction had been completed: A bill of costs would have been made out by the attorney against *Williams*. He would have charged for inspecting the deeds and perusing the abstract, and probably would also charge the usual procuration-fee. If this had occurred, could it be said that the relation of attorney and client did not exist between these parties? If only one attorney is employed between a mortgagor and mortgagee, it would be a great evil if the attorney were allowed to disclose any defects which he might have discovered in the title of the mortgagor. This case seems to me to be within the principle laid down, at least in later times, and I think this evidence ought not to have been received; but the case must go down for a new trial.

PARK, J.—This case is like *Taylor v. Blacklow* (*h*). Reference is there made to a passage in *Com. Dig.* (*i*), which is exactly in point. It has been contended that *Church* was attorney for the lender of the money, but that point is met in my Lord Chief-Justice's judgment, in *Taylor v. Blacklow*.

(*d*) *Wadsworth v. Hamshaw*, 2 Brod. & Bing. 5. *Clark v. Clark*, 2 Moody & Mal., 3.  
 (*e*) 1 Mylne & Keene, 98.  
 (*f*) 2 Vend. & Purch. 299. 9th edit.

(*g*) 7 East, 357.  
 (*h*) 3 Bing. N. C., 235.  
 (*i*) *Com. Dig.* Tit. Action on the case.  
 A. 5.

VAUGHAN, J.—I am of the same opinion. The question is, whether the relation of attorney and client existed, and I cannot understand the evidence except by supposing that it did exist. Nobody can doubt but that the attorney was professionally consulted for the purpose of raising a loan of money.

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Doe, *J. Thomas*,  
v.  
Watkins.

Rule absolute for a new trial, upon terms agreed upon.

RICHARDS and Wife, Executrix of PEGGY MANLEY, deceased, v. BROWNE, Executor of DENNIS WITHERS WADE, deceased, who was Executrix of WILLIAM BARRY WADE, deceased.

Jan. 23rd.

THE plaintiffs declared on a promissory note, bearing date the 12th of April, 1816, by which *William Barry Wade*, deceased, promised to pay *Peggy Manley*, deceased, 100*l.*, with lawful interest for the same. Also on an account stated, between *Peggy Manley*, deceased, and *Dennis Withers Wade*, as executrix of *William Barry Wade*. The defendant pleaded, First, That at the time of the commencement of the suit, and ever since, he had had no goods or chattels of *William Barry Wade*, deceased, at the time of his death in the hands of the defendant, as executor as aforesaid, or otherwise to be administered. And also that at the time of the commencement of the suit, and ever since, he had had no goods or chattels of the said *Dennis Withers Wade*, deceased, at the time of her death, in the hands of the defendant, as executor as aforesaid, to be administered. Secondly, No effects of the said *William Barry Wade*. Thirdly, Payments of several specialty debts due from *Dennis Withers Wade*, and an allegation of others outstanding. Lastly, Full administration of all the effects of *Dennis Withers Wade*, deceased. The plaintiffs replied to the first and last pleas, that at the commencement of the suit the defendant had in his hands effects of *William Barry Wade*, deceased, at the time of his death, to be administered.

The attorney of one who had a claim on a deceased person's estate, wrote a letter to the executrix, in which he stated that the creditor did not claim the debt from her as executrix, but that he claimed it from her individually, she having paid the interest from time to time. The executrix afterwards died insolvent, and it was held that this letter did not release her from her liability as executrix.

At the trial before *Bolland, B.*, at the last *Taunton* assizes, the following facts were proved or admitted. The plaintiff's wife was executrix of *Peggy Manley*, deceased. The plaintiffs sued, on a promissory note, for 100*l.*, given by *William Barry Wade* to *Peggy Manley* in 1816, the interest on which had been regularly paid by *William Barry Wade* during his life, and by *Dennis Withers Wade* after his death, up to the year 1831. *William Barry Wade* died in 1825, bequeathing to Miss *Dennis Withers Wade*, his executrix, his household furniture, for her life, and after her death, bequeathing it to Miss *Sarah Chapple*. *Dennis Withers Wade* died in 1832, leaving defendant her executor.

In July, 1831, *James Waldron*, the plaintiffs' then attorney, wrote to the defendant and his brother, on the subject of this promissory note, as follows:

" *Richards and Wade.*

" Gentlemen,

" *Wiveliscombe, 16th July, 1831.*

" As I am apprehensive we have in some measure misunderstood my clients' demand, I write you by return of post. My clients do not claim

A testator bequeathed certain goods to his executrix for life, with remainder to B. absolutely. The executrix used the goods during her life, and after her death, her executor permitted B. to receive them. The executor of the executrix (who died insolvent) was afterwards sued for a debt due from the testator, who had bequeathed the goods, which the executrix had neglected to discharge; Held that she had not been guilty of a *deceit* in her lifetime, and that her executor ought to have discharged the debt by selling the goods.

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from Miss *Wade* payment of this money as executrix or administratrix of *W. B. Wade, Esq.*, but they claim from Miss *Wade* individually, Miss *Wade* having become liable, from payment of interest from time to time, of this debt.

"Yours, &c.,

"*James Waldron.*"

*Waldron* was not called as a witness, and there was no evidence of his authority to write the letter, except that he at that time acted as plaintiffs' attorney. The letter was not stamped, nor was there any evidence of payment made in consequence thereof. The plaintiffs had previously, in *May*, 1831, given the defendant and his partner, who were the attorneys of Miss *Wade*, the following receipt for one year's interest of the sum claimed in this action :

"1831, *May* 24.

"Received of Messrs. *R. and M. Browne*, by payment of Mr. *James Waldron*, the sum of five pounds, being for one year's interest of one hundred pounds, due from Miss *Dennis Withers Wade* to us on the 12th of *April* last

"*William Richards*,

"*Peggy Richards.*"

Upon the death of Mr. *Wade*, Miss *Wade* took possession of the furniture bequeathed to her for life, and upon her death, Miss *Sarah Chapple*, with the consent of the defendant, took possession of the same furniture, which had been bequeathed to her by the will of *William Barry Wade*. The plaintiffs proved that the furniture was then in the hands of Miss *Sarah Chapple*, and that it was worth 200*l.* A verdict was thereupon found for the plaintiffs, subject to the opinion of the Court on a special case, stating the above-mentioned facts. The question for the opinion of the Court was, whether, under the foregoing circumstances, the defendant was liable to pay the promissory note on which the plaintiffs sued.

*Bere*, for the plaintiff (*R. Bayly, jun.*, was with him).—It is clear that the maker of the note was liable upon it, and that he left assets sufficient to pay it. If an executor assents to a specific legacy, and there is ultimately a deficiency of assets to pay the testator's debts, the executor is liable, and that although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate. *Williams's Law of Executors*, page 530. Here the defendant assented to the legacy received by Miss *Chapple*, and neglected to discharge the debt due from the testator. It will be contended that the letter written by Mr. *Waldron* discharged Miss *Wade* altogether as executrix, and made her liable only in her individual capacity; but if an action had been brought against her in her life-time as executrix, the letter would have afforded her no defence, and the defendant, as her representative cannot be in a better situation. The letter is objectionable upon several grounds. First, It does not show any consideration. Secondly, There is no memorandum in writing to satisfy the Statute of Frauds. Thirdly, The letter only contained a proposition, and it does not appear whether it was afterwards acted upon, or whether the terms of it were acceded to; and Fourthly, If it be taken to be evidence to show a new contract substituted for the old one, then it required a stamp. Nor is there any plea to meet the Court

in the declaration on an account stated with Miss *Wade* as executrix, so that that there is an admission on the record that she was liable as executrix.

Another objection is, that under the plea of *plene administravit* the defendant could not prove that he had assented to the legacy to Miss *Chapple* without notice of an undischarged debt. That plea only puts in issue such payments as are made in the due course of administration; and if a debt of an inferior nature is paid before notice of the existence of a debt of a higher nature, it must be pleaded specially; and the same principle would be applicable in this case. In *Davis v. Blackwell* (a), it was held that if an executor paid legacies six months after probate, he could not plead such payment in discharge of an action on a covenant made by the testator; although in *Chelea Water-works v. Couper* (b), the Court refused to interfere after a lapse of thirty years. But in this case it is found as a fact, that immediately after the death of Miss *Wade*, the defendant allowed Miss *Chapple* to take possession of the furniture bequeathed to her by Mr. *Wade*, and that is equivalent to finding that the defendant has now the assets in his hands.

*Erle*, for the defendant.—First, If a creditor is guilty of gross laches, and further, if he by his own act induces the executor to administer the effects, he cannot afterwards make a claim upon the estate and sue the executor. Here the maker of the note died in 1825, and it is admitted that he was possessed of ample assets to pay the debt: in 1831 it appears, by the letter written to the executrix, that the plaintiffs considered that she was liable in her individual character. Now the plaintiffs seek to recover against her representative, *de bonis propriis*, on the ground that Miss *Wade* left assets belonging to the testator. But it ought to be satisfactorily shown why no demand was made during so long a period, upon the estate of W. B. *Wade*, the maker of the note. The omission to obtain payment, coupled with the letter, which is express in its terms, and which was written by the plaintiffs' attorney, clearly demonstrates that the plaintiffs had accepted Miss *Wade* as their debtor. The receipt, in 1831, is also given for money due from Miss *Wade*, not describing her as executrix. The effect of these transactions was therefore to discharge Miss *Wade* in her capacity of executrix, and as her estate is admitted to be insolvent, the plaintiffs are not entitled to recover. In *Skyring v. Greenwood* (c) it was held that the paymaster of a regiment, who had received an officer's pay, and in his yearly accounts had neglected to inform him that a reduction had been made by the *Board of Ordnance*, could not afterwards sue the officer for the amount of the increased pay which they had credited him with; and *Abbott, C. J.*, said, "It works a great prejudice to any man if, after having had credit given him in account for certain sums, and having been allowed to draw on his agent, on the faith that those sums belonged to him, he may be called upon to pay them back." So here, after the plaintiffs had treated Miss *Wade* as their debtor, and had allowed her to treat the debt as being due from herself, it is too late to say now that any part of W. B. *Wade's* property are assets in the defendant's hands to pay the debt. In *Brooking v. Jennings* (d) it is said that debts upon simple contracts may be paid before bonds, unless the executors have timely notice given them of

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(a) 9 Bing. 5.  
(b) 1 Esp. N. P. C. 275.

(c) 4 B. & Cress. 281.  
(d) 1 Modern, 175.



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those bonds. *Harman v. Harman* (e) also shows that the executor must have due notice given to him, or he will not be liable. It was upon the faith of the letter written by the plaintiffs' attorney that the defendant took a step in the administration, by allowing Miss *Chapple* to take the legacy, and every reasonable delay had then taken place. In establishing a rule on this point, there is a peril to be guarded against, because an executor may retain legacies in his hands for many years, saying that he fears that debts owing by the testator were still outstanding. [VAUGHAN, J.—I believe it is usual to take security from legatees.] But secondly, no assets belonging to W. B. *Wade* have ever come to the defendant's hands to be administered. The testator gave the furniture to Miss *Wade* for life, and the remainder to Miss *Chapple* absolutely. If this life estate had been in one who was not executrix, and the executrix had assented to the taking of the goods by the legatee for life, without first satisfying the testator's debts, it would clearly have been a *devastavit*, and the circumstance that the legatee for life was the executor, makes no difference. Miss *Wade's* conduct, in holding and using the furniture during her life, leads to a conclusive presumption that she assented to the legacy. If therefore the testatrix was guilty of a *devastavit* in her lifetime, then no assets belonging to her testator have come to the defendant's hands, and the defendant is not liable in this action. After the executrix had assented to the legacy, Miss *Chapple* might have maintained trover to recover this specific legacy, *Doe, d. Saye, v. Guy* (f); and there are authorities to show that the assent to the particular estate is also an assent to the remainder, *Hyde v. Parrot* (g), *Welcken v. Elkington* (h), *Lampet's case* (i).

*Bere*, in reply.—*Brooking v. Jennings* (k) shows that if an executor relies on the payment of a simple contract debt before notice of a debt of a higher nature, it ought to be specially pleaded. The same rule is applicable here, if the defendant relies upon his want of notice of the plaintiffs' demand. The question whether the letter amounted to a notice would then have been raised. The real question is, whether the defendant had not a sum of 200*l.* in his hands, with which he ought to have discharged the plaintiffs' demand.

TINDAL, C. J.—The defendant has relied upon two objections: First, that the plaintiffs have been guilty of laches, and have misled the defendant; and secondly, that Miss *Wade* was guilty of a *devastavit* in her lifetime, and that the defendant is not in that case liable, because he had no assets to administer. As to the first objection, I am ready to admit that if a creditor does, by letter, or in any other manner, mislead an executor, so as to make him take a course in the administration which is not strictly legal, the creditor cannot afterwards avail himself of that which was done at his solicitation; but this case is not within the reach of that principle. Miss *Wade* paid the interest to the plaintiffs during her life: she was executrix to her brother, the original debtor, and therefore the payments must be inferred to have been made, as executrix. It is true, there had been a communication by letter between the plaintiffs' attorney and Miss *Wade's* attorneys. We have not the correspond-

(e) 3 Modern, 115.  
 (f) 3 East, 120.  
 (g) 1 P. Wills, 3.

(h) Plowd. 521.  
 (i) 10 Rep. 47 a.  
 (k) 1 Modern, 175.

ence before us, to which the letter seems to have been an answer, and therefore we must be guided by the letter alone. It commences—" *Richards and Wade*," by which I should infer that some demand had been made by the plaintiffs on account of the promissory note. The letter then proceeds as follows: "As I am apprehensive we have in some measure misunderstood my clients' demand, I write to you by return of post. My clients do not claim from Miss *Wade* payment of this money as executrix or administratrix of *W. B. Wade*, Esq., but they claim from Miss *Wade* individually, Miss *Wade* having become liable, from payment of interest from time to time, of this debt." Now here is a reason given for the alteration of the liability, which is untenable in point of law. No consideration for the change appears, and even if it did, then there is no promise in writing to satisfy the Statute of *Frauds*; the consequence is, that this is a mere gratuitous statement that the writer intended to look to Miss *Wade* individually for payment. Suppose the day after this was written the parties had changed their minds, and had sued Miss *Wade* as executrix, this letter would have afforded her no defence. If, upon Miss *Wade's* death, the plaintiffs had sued the defendant as for a debt due from her personally, it would then have been said that she was only liable as the representative of her brother, and the plaintiffs would have been defeated; so that the defendant would have acquired a double answer to the claim, and the plaintiffs would have had no right of action at all. But from this letter, it is clear that the defendant had notice that the debt was outstanding; and the transaction stands clear of all the cases relating to laches. The defendant had actual notice; and there is no ground for contending that the plaintiffs were guilty of laches, or of misleading the defendant, and therefore there being this furniture, which the defendant might have retained or sold, to pay the debts, he did not duly administer the assets, and upon this point our judgment must be for the plaintiffs. We then come to the second question; and I am of opinion that it does not appear that Miss *Wade* committed a *devastavit*. If there be a legacy to A. for life, and afterwards to B., and the executor assents to the taking of the legacy by A., that is a very different thing, from a bequest in which the executor is the party to whom the life estate is given, because the executor in that case must take the property at all events; but when a party may take by a good title, or by a bad one, the law will presume that he took by the good title, until the contrary is shown. The plaintiffs are therefore entitled to judgment upon this point also.

PARK, J.—I am of the same opinion.

VAUGHAN, J.—It is only necessary to look at the issue which was raised; namely, whether there were not assets belonging to Mr. *Wade* to be administered. The facts are, that his executrix was possessed of goods belonging to him worth 200*l.*; and immediately after her death, Miss *Chapple*, by the express consent of the defendant, took possession of them; therefore this was a very precipitate administration of the assets.

Judgment for the plaintiffs.

Com. Pleas.  
RICHARDS  
v.  
BROWN.

Com. Pleas.

Jan. 24.

## ABBOTS v. KELLY.

A *distringas* which issues more than four months after the date of the writ of summons, is irregular.

**BAGLEY** had obtained a rule *nisi* calling upon the plaintiff to show cause why a *distringas* should not be set aside, upon the ground that it had been issued more than four months after the date of the writ of summons. He cited *Sewell v. Brown* (a).

**Talfourd**, Serjt., showed cause.—*Sewell v. Brown*, was not an application to set aside the *distringas*, but the Court refused to grant one, because the writ of summons was not continued in pursuance of 2 Will. 4, c. 39, sec. 10.

**TINDAL**, C. J.—This writ might easily have been continued by *alias* or *pluries*. After four months the writ of summons ceased to be in force. The object of the *distringas* is to obtain an appearance to the writ of summons.

Rule absolute.

(a) 1. Hodges, 317. S. C. *Lemon v. Lemon*, 2 Scott, 506.

Jan. 26.

## SHERMAN v. TINSLEY.

Where it appeared by the return of the sheriff to a writ of trial that it was executed a day after the return day, an application was made by the unsuccessful party who had appeared at the trial, to set the writ aside; but the Court intimated that in such a case they would amend the return if necessary.

**THIS** was a writ of trial directed to the sheriffs of London, returnable on the 19th of *January*. The cause was set down for trial on the 19th, but in consequence of a press of business it did not come on, and the Court was adjourned until the following day, when the defendant appeared by his attorney, and a verdict was found for the plaintiff. The sheriff's return stated that the writ was executed on the 20th *January*.

**Chadwick Jones** moved to set the proceedings aside, upon the ground that it appeared by the record that the judge had no authority to try the cause on the 20th. He contended that it was the usual practice, under similar circumstances, to re-seal the record.

**TINDAL**, C. J.—The defendant appeared by his attorney at the trial, and he cannot now say that the Court had no jurisdiction. At all events we should certainly allow the record to be amended, where the objection is so much against the justice of the case.

The other judges concurred.

Jan. 30.

## LUCAS v. GOODWIN.

An affidavit of debt stated that the defendant was indebted to the plaintiff, for materials found and provided, goods sold and delivered, and work and labour done and performed by the plaintiff, to and for the use of the defendant. *Held*, that the latter allegation had reference to the whole of the items, and that the affidavit was not defective.

**WILDE**, Serjt., moved for a rule *nisi* to discharge the defendant out of custody upon entering a common appearance, on the ground that the affidavit by which he had been held to bail was defective. It stated "that

the defendant was indebted to the plaintiff in £240 for materials found and provided, goods sold and delivered, and work and labour done and performed by this deponent to and for the use and benefit of the said defendant, and at his request." Here are three heads of demand, and it appears that only the work and labour was done for the use of the defendant, and at his request.

*Com. Pleas.*  
LUCAS  
v.  
GOODWIN.

TINDAL, C. J.—The more natural construction of the affidavit is, that the latter words have reference to the whole of the items. I think it is sufficient.

PARK, J. and VAUGHAN, J. agreed.

Rule refused.

DOE, d. PHIPPS, v. ROE.

Jan. 31st.

SWANN moved for judgment against the casual ejector. The declaration in ejectment was intituled as of *Michaelmas* Term, in the *eighth* year of the reign of Wm. 4; the notice was dated 6th Dec. 1836, to appear in *Hilary* Term then next.

Where the date of a declaration in ejectment was wrongly stated, but the notice at the foot was correct, the Court granted a rule for judgment against the casual ejector.

PARK, J., doubted whether the rule ought to be granted, by reason of the mistake in intituling the declaration of the eighth year of the king, instead of the seventh; but having consulted the judges of the other courts, he subsequently granted the rule, upon the authority of *Doe, d. Gore, v. Roe (a)*, and *Doe, d. Smithers, v. Roe (b)*.

(a) 3 Dow. P. C. 5.

(b) 4 Dow. P. C. 374.

DUMSDAY, dem<sup>t</sup>. v. Sir RICHARD HUGHES, Bart., ten<sup>t</sup>.

Jan. 30th.

WRIT of right issued 27th Dec., 1834, returnable 26th Jan., 1835.

The demandant claimed certain lands in the county of Suffolk as his right and inheritance. The Count stated that *Shadrack Blundell* was seised of the tenements demanded on his demesne as of fee and right in the time of peace, in the time of the Lord George the Second, late King of *Great Britain*, by taking the esplees thereof to the value, &c.; and the said *Shadrack Blundell* on the 8th June, 1750, by indenture of bargain and sale, bargained and sold the premises demanded to *W. Farnworth* and *J. Salmon* for one year; and on the 9th June, 1750, by indenture of release between *Shadrack Blundell* of the first part, *Ann Slater* of the second part, *W. Farnworth* of the third part, and *J. Salmon* of the fourth part, in consideration of a marriage between *Shadrack Blundell* and *Ann Slater*, the said *Shadrack Blundell* released the premises demanded to the said *W. Farnworth* and *J. Salmon*, and their heirs, to the use of *Shadrack Blundell* until the marriage should take effect; and after the solemnization

A Count in a Writ of Right must show upon the face of it that the ancestor of the demandant had seisin of the tenements within sixty years from the date of the Writ.

Where there was a life interest outstanding in an estate tail—*Held*, that the heir of the grantor who claimed on failure of the estate tail, had twenty years to bring an action of *Formedon in reverter*.

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thereof, (subject to a term of 99 years if *Shadrack Blundell* and *Ann Slater* should so long live) to the use of *Shadrack Blundell* for life. Remainder to the first and other sons of *Shadrack Blundell* and *Ann Slater*, in tail male. Remainder to their daughters, as tenants in common, with an ultimate remainder to the said *Shadrack Blundell* and his right heirs in fee. That afterwards, to wit, on the 10th June, 1750, the said marriage was duly solemnized, and on 1st Jan. 1753 the said *Shadrack Blundell* died without having had any issue, leaving the said *Ann* his wife him surviving, and thereupon the said *Ann* became seised of the said tenements in her demesne, as of freehold and right for life, in the time of peace, in the time of our said Lord George the Second, by taking the esplees thereof, to the value, &c., and continued and was so seised thereof in the time of peace, in the time of the Lord George the Third, late King of *Great Britain*, to wit, within 60 years now last past, by taking the esplees thereof, to the value, &c., and afterwards, on the 18th October, 1777, died so seised of the said tenements; whereupon the right of the said tenements descended and came to one *Mary Rushley* (formerly *Mary Blundell*), one *Elizabeth Blundell*, one *Jane Dumsday* (formerly *Jane Blundell*), and one *Hannah Gregory* (formerly *Hannah Blundell*), as cousins and heirs of the said *Shadrack Blundell*; that is to say, as daughters and co-heirs of one *Edward Blundell*, who was brother and heir of one *John Blundell*, who was son and heir of one other *John Blundell*, who was son and heir of one other *John Blundell*; which said last-mentioned *John Blundell* was father of one *Nicholas Blundell*, who was father of one *Shadrack Blundell*, who was father of the said first-mentioned *Shadrack Blundell*. That on the 1st Jan., 1778, the said *Elizabeth Blundell* died without issue, and intestate, whereupon all her right and interest in the said tenements descended and came to the said *Mary Rushley*, *Jane Dumsday* and *Hannah Gregory*, as her surviving sisters and co-heirs. That on the 1st Jan., 1779, the said *Jane Dumsday* died, leaving *John Dumsday* her son her surviving, whereupon all her right descended to the said *John Dumsday* as her son and heir. That on the 1st Jan. 1783, *Mary Rushley* died without issue, whereupon all her right descended to *Hannah Gregory* and *John Dumsday*, as sister, nephew, and co-heirs of *Mary Rushley*. That on 1st Jan. 1786 *Hannah Gregory* died without issue, whereupon all her right descended to *John Dumsday*, as her nephew and heir at law; whereby the right to the whole of the said tenements became vested in the said last-mentioned *John Dumsday*, and from him the right descended and came to the said *John Dumsday* the now demandant, as grandson and heir of the said *John Dumsday*, the son of the said *Jane Dumsday*; the said *John Dumsday*, the demandant, being the son of one other *John Dumsday*, who was the son of the said *John Dumsday*, the son of the said *Jane Dumsday*; and that such was the right of him the said *John Dumsday* the demandant, he offered, &c.

*Demurrer* to the Count:—The causes assigned were, First, That it did not appear that *Shadrack Blundell* was ever seised in fee of the tenements demanded, by taking *esplees* within 60 years before the *teste* of the writ—Second, That it did not appear that *Ann Blundell* was ever seised in fee of the tenements demanded by taking the *esplees*.—Third, That it did not appear that the demandant deduced his title from any ancestor who was

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seised in fee of the tenements demanded, by taking the esplees at any time within 60 years before the *teste* of the writ.—Fourth, That although the demandant deduced his title from *John Dumsday*, it did not appear that *Jane Dumsday*, his mother, was ever married, or that the said *John Dumsday* was issue of any marriage, or that the said *John Dumsday* was ever seised of the tenements demanded as of fee and right, or that he died so seised, or that he ever died.

*J. Bayley*, in support of the demurrer.—A former writ of right to recover lands under this title has already been set aside after argument on demurrer (*a*). This count does not allege a seisin in fee by the demandant's ancestor within 60 years before the *teste* of the writ. The statute 32 Hen. 8, c. 2, requires that this should appear. The preamble states:—"Forasmuch as the time of limitation appointed for suing of writs of right, and other writs of possession, and seisin of men's ancestors or predecessors, or of their own possession, or seisin by the laws and statutes of this realm heretofore made, limited, and appointed, extend and be of so far and long time past that it is above the remembrance of any living man truly to try and know the perfect certainty of such things as hath or shall come in trial, or do extend unto the time and times limited by the said laws and statutes, to the great danger of men's consciences that have or shall be empannelled in any jury for the trial of the same; and it is also a great occasion of much trouble, vexation, and suits to the king's loving subjects at the common laws of this realm, so that no man, although he and his ancestors, and those whose estate he or they have been in peaceable possession of a long season, of and in lands, tenements and other hereditaments, is or can be in any surety, quietness, or rest of and in the same, without a good remedy and reformation be had, made, and provided for the same;" and it is then enacted, "That no manner of person or persons shall from henceforth sue, have, or maintain any writ of right, or make any prescription, title or claim, of, to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor which hath been and now is or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments within three-score years next before the *teste* of the same writ, or next before the said prescription, title, or claim so hereafter to be sued, commenced, brought, made or had."

Here *Shadrack Blundell* died in 1753, and this writ was issued in 1834. It therefore appears that it is more than 60 years since the plaintiff's ancestor was in possession and took the esplees. In *Widdowson v. Earl of Harrington* (*b*), *Sir Thomas Plumer*, M. R., in speaking of sec. 2. 32 Hen. 8, c. 2. observes, "Now the statute speaks of actual seisin and possession, it is not merely a seisin in law. We know that a demandant in a real action must state a seisin in his ancestor by taking the esplees. In a remedial action, it is often only necessary to state when the title accrued, but where

(*a*) *Dumsday v. Hughes*, 3 Bos. and Pul. 453.

(*b*) 1 Jac. & Walk. 547.

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the form of the action requires that the demandant should count on the seisin of his ancestor, he can only avail himself of the remedy when there has been a taking of the esplees within 50 years. The quotations from *Rastall's Enteries* prove that this form of pleading must be followed." And the same learned judge also says, after the case had been again argued (c), "Then what is the constant form of the writ? It is admitted that no precedent is to be found where the demandant does not count upon the seisin of his ancestor by taking the esplees. The plaintiff must therefore state that, if it is traversed he must prove it, and it is traversed here. But he cannot show that his ancestor has been seised within 50 years; he cannot therefore support the count, and, upon his own showing, he would be out of court." As to the seisin of *Ann Blundell*, she had only an estate for life in the premises under the marriage settlement, and the demandant, in a real action, must count on a seisin in the ancestor, which means a seisin in the person from whom there is a descent, *Dally v. King* (d); and on the death of the tenant for life, the remedy to recover the estate was a writ of formedon in the reverter, which ought to have been brought within 20 years—21 Jac. 1. c. 16. Another objection is, that the count ought to have shewn that *Jane Dumsday* was married: as it now stands, it does not appear that *John Dumsday* is legitimate: nor does it state the death of *John Dumsday*.

*Stephen, Serjt., contra.*—The former writ (c) was brought to recover different lands, and the objection to that count was, that it was not shewn how the lands descended to the four nieces and co-heirs of *Shadrack Blundell*. That defect has now been supplied. Now it is objected that the count does not shew a seisin in *Shadrack Blundell* by taking the esplees within 60 years. The answer is, First, that this need not be shown in any case; and Secondly, if it be necessary in general, it is not in this particular case.—First, the precedents are both ways. In *Rastall's Enteries* (f), the form is, that the ancestor was seised "*tempore regis nunc*," and the teste of the writ does not appear upon the record. To the same effect is the form in *Booth's* suit at law (g). In *Coke's Enteries* (h) the seisin is alleged to have been in the time of Philip and Mary, late King and Queen of England. And the more ancient authorities are to the same effect.—*Year Book*, tem. 10 Ed. 3, pl. 22. But, Secondly, at all events it was unnecessary to allege a seisin by *Shadrack Blundell* in this case, because there was an intervening life estate, and the heir of the grantor would be entitled to try his writ of right in such a case.—*Co. Lit.* 281. It would be unreasonable to say that the demandant would be barred for ever at the end of 20 years. The other grounds of demurrer cannot be supported. The precedents in the books do not contain allegations of marriages or deaths, *Booth*, 104; *Bracton*, 372; and the reason is that the expression "son and heir" includes everything which is necessary.

*Bayley*, in reply, was requested by the Court to confine his argument to the first point.—As to the precedents which have been referred to, it only

(c) 1 Jac. & Walk. 557.

(d) 1 H. Black. 1.

(e) *Dumsday v. Hughes*, 3 Bos. and Pul.

(f) Tit. Droit, 241, 246.

(g) Lib. ii., p. 94, 104.

(h) Tit. Droit, 182

became necessary to aver a seisin within 60 years after the passing of the statute, and some of these precedents seem to have been adapted to the former state of the law; and as the Court would take judicial notice of the dates of kings' reigns, it would therefore be sufficient to shew that the esplees were taken in the reign of a king who had reigned within 60 years; but here it is manifest that the esplees were taken more than 60 years ago, because King George II. ceased to reign in 1760.

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TINDAL, C. J.—I am of opinion that this count is bad, because it does not appear that the seisin of the ancestor was within 60 years from the issuing of the writ. I do not say that there must be an express allegation of that fact, because some of the precedents do not state it expressly; but it is impossible to read the statute 32 Hen. 8, c. 2, without seeing that it ought to appear affirmatively on the record, either expressly, or by a statement of facts from which it must be necessarily implied that there had been a seisin of the ancestor within 60 years. The statute enacts that no person shall maintain any writ of right of the possession of his ancestor "and declare and allege any further seisin or possession of his ancestor, but only of the seisin or possession of his ancestor which hath been and now is, or shall be seised of the said manor, within three-score years next before the *teste* of the same writ, &c.;" and the great distinction between this statute and the 21 Jac. 1, is, that the latter merely enacts that certain actions "shall be brought" within 20 years. If in a real action the tenant chooses to deny the seisin within 60 years, he tenders a demi mark to have the seisin inquired into; and sec. 6 of the statute shews that the allegation of seisin may be traversed or denied. In the precedents which have been referred to, the seisin is in some instances stated "*tempore regis nunc, or tempore regis nuper.*" So, if this count had alleged a seisin in the reign of his present Majesty, or in the reign of his late Majesty George the Fourth, it would have sufficiently appeared that it was within 60 years; and I take that to be the reason why in those particular instances the counts were in that form. It was therefore the duty of the demandant to shew that his ancestor was seised within 60 years, and as he has not done so, he is not entitled to our judgment. But the matter does not rest here. The esplees are stated to have been taken in the time of King George II., which amounts to an express allegation that they could not have been taken within 60 years. It appears to me that there is also another ground which would prevent the demandant from enforcing his claim. It appears that the tenant for life was seised more than 60 years ago. Here then was an estate tail created, and the remedy was therefore by a writ of formedon. If the action were brought by the issue in tail, then by the statute W. 2., c. 1., *De Donis Conditionalibus*, it would be formedon in the descender. If by one who claimed the reversion of the estate in tail spent, then it would be by formedon in the reverter. Fitz. N. B., 546, cited in *Booth on Real Actions* (i), where it is said, "A formedon in reverter lieth where the donee in tail, or his heirs, dieth without issue, then the donor, or his heirs, may have this writ." Here there was a gift in tail, with the reversion to the grantor and his heirs, upon the determination of the estate tail, and the proper form of

(i) Bk. ii., cap. 19. Tit. *Formedon in Reverter*.



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Court, which is but a substitute for the old practice of payment of money into Court, under the common rule, upon the whole declaration; and it may be reasonable to continue the same privilege to a defendant under the new plea. The difference between a plea like the present, and a plea of payment of money into Court, is distinctly recognised by *Patteson, J.* in *Marshall v. Whiteside (c)*.

*Whateley, contra.* The plea is expressly limited to 47*l.* 1*s.* 7*d.* parcel of the sums mentioned in the declaration, and proceeds to allege the payment of a correspondent amount in satisfaction of the damages arising from the nonperformance of the "promises" as to that sum. It is plain, therefore, that the plea points only to the sums mentioned in the declaration, to which the promises may be referred, and there can be no pretence for saying that it is doubtful whether it applies to the whole or to part only of the declaration.

As to the second objection.—In *Marshall v. Whiteside (e)*, where there was a plea of payment into Court of one entire sum, upon two out of five breaches of covenant, without distinguishing how much was paid in respect of one, and how much in respect of the other, it was held to be good. That case overrules *Mee v. Tomlinson*, which is at variance with the judgment in *Jourdain v. Johnson (f)*, and has been since disapproved of by *Patteson, J.*, who concurred in the decision. It has been suggested, that there is a difference between a plea of payment of money into Court, and a plea of payment in satisfaction before action brought. The only difference is, that the one is against further maintenance of the action, because of a payment *after* action brought; and the other is in bar, because of a payment *before* its commencement. The plea of payment of money into Court is not to be regarded as a mere deviation from the principles of pleading, but as new in instance only, and to be used in conformity with those principles. The main object of the new rules was, not to introduce new principles of pleading, but rather to compel litigants to frame their pleadings agreeably to those principles which in modern times have been departed from. The decision in *Marshall v. Whiteside (e)* is, therefore, a decision, that a plea of payment need not particularise the portions of the demand to which it is to be applied. A plea of tender is always pleaded generally, as in the present instance. This plea is, in fact, a plea of *general* payments on account, which the plaintiff might appropriate as he pleased. The actual appropriation lies more in the knowledge of the plaintiff than of the defendant, who, from that circumstance, is under a greater difficulty as to the evidence on the trial than the plaintiff. Had the defendant pleaded payment of 200*l.* in liquidation of the claim on the second breach, the plaintiff on the trial might say, "No—you paid me the money generally; and, as I had a right to do, I applied that sum to the account stated." A debtor therefore, paying money generally on account, has a right to plead according to the fact; for if he pleads a specific appropriation, he may be defeated by an appropriation of which he was ignorant.

*Erle, in reply.* It is by no means clear, as it ought to be, whether the plea applies to the whole or to part only of the breaches stated in the declaration. *Marshall v. Whiteside (e)* is not an authority in favour of the plea, because

(c) 1 Gale, 379 & 1 Mees & Wels. 191;  
& 4 Dowl. Pr. Ca. 766.

(f) 1 Gale, 312; 2 Cr. Mees & Ros. 564  
& 4 Dowl. Pr. Ca. 534.

there the plea was not a plea of payment in satisfaction, but a general plea of payment of money into Court, and the damages were unliquidated; and, therefore, were not capable of ascertainment without the intervention of a jury. But where the damages are liquidated, as they are in this case, at least as to the second and third counts, the defendant may know the amounts in respect of which he has made any payments. As to the argument derived from the doctrine of the appropriation of payments, it is the defendant's own fault if he has not prescribed the application of his payments.

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TINDAL, C. J.—“For a further plea in this behalf” goes to the whole declaration; and the plaintiff ought to see distinctly to what portion of it the payment applies. It appears from *Com. Dig.* tit. *Accord with satisfaction*, (B. 1.) that a plea of an accord to deliver, &c. in satisfaction of part of a debt, is not good (g).

It is said that Mr. Justice Patteson is dissatisfied with the determination in *Mee v. Tomlinson*; but he seems to think that the doctrine is still applicable to a plea of accord and satisfaction.

VAUGHAN, J., concurred.

#### Judgment for the plaintiff (h).

(g) The reference in *Com. Dig.* is to 4 Co. 3, where is the following passage:—“If the debtor gives the creditor a horse, or any other thing in satisfaction of part of his debt, it shall be a bar for no part, for the uncertainty.” See *Fin. Abr.* tit. *Uncertainty*, pl. 4.

(A) PARK, J., was sitting at Chambers. This case was argued by *Erle* for the plaintiff in *Michaelmas* Term, and the Court then suggested that the defendant ought to amend, but the suggestion was not subsequently acted upon, and in this Term the case was again entered and argued.

#### ROBSON v. FALLOWES.

*ASSUMPSIT* on a bill of exchange, drawn by *William* and *Robert Allanson*, upon and accepted by the defendant, and afterwards indorsed by the drawers to the plaintiff. The defendant pleaded that the said Bill of Exchange was accepted by him, at the request of the drawers thereof, for the accommodation of the said drawers, and not for any consideration whatsoever; and that after the acceptance of the said bill of exchange, the said *William Allanson* and *Robert Allanson*, at the request of one *Henry Allanson*, indorsed the same to the said *Henry Allanson*, in order that the said *Henry Allanson* might apply the same for his own use; and that there was not any consideration whatever for the said indorsement by the said *William Allanson* and *Robert Allanson* to the said *Henry Allanson*; that afterwards

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 In an action on a Bill of Exchange by indorsee against the acceptor, the defendant pleaded that the bill was accepted for the accommodation of the drawers, who had indorsed it without consideration; and that certain unlawful wagers and contracts were made between the indorsee and the plaintiff, relating to the then future price of Spanish Cortes Bonds, and thereupon it was unlawfully agreed between the plaintiff and the indorsee, that there should not be any actual or bona fide transfer of the said Stock, but that in case the price thereof should be less than a certain price, to wit, 67l. 7s. 6d. for 100l. in the said Stock, at certain times, to wit, &c. that the said indorsee should pay the plaintiff the difference which might then be between the said respective prices; but that if the price should be more than the said specified price, then the plaintiff should pay the indorsee such difference or excess. The plea then averred that the Bill of Exchange was given to the plaintiff as a security for the balance which might become due under and by virtue of the said illegal wagers:—*Held*, that a variance at the trial in the proof of the price of the Stock was immaterial.

price of Spanish Cortes Bonds, and thereupon it was unlawfully agreed between the plaintiff and the indorsee, that there should not be any actual or bona fide transfer of the said Stock, but that in case the price thereof should be less than a certain price, to wit, 67l. 7s. 6d. for 100l. in the said Stock, at certain times, to wit, &c. that the said indorsee should pay the plaintiff the difference which might then be between the said respective prices; but that if the price should be more than the said specified price, then the plaintiff should pay the indorsee such difference or excess. The plea then averred that the Bill of Exchange was given to the plaintiff as a security for the balance which might become due under and by virtue of the said illegal wagers:—*Held*, that a variance at the trial in the proof of the price of the Stock was immaterial.

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and before the delivery of the said bill of exchange by the said Henry Allanson to the plaintiff, as hereinafter mentioned, to wit, on the 1st day of May, in the year 1835, certain unlawful wagers, and contracts in the nature of wagers, and refusals, were made and entered into between the said Henry Allanson and the said plaintiff, relating to the then future prices and value of certain public stock and public securities, to wit, *Spanish Cortes Bonds* and *Spanish Scrip* to a large extent, to wit, to the extent of 20,000*l.* thereof, whereby the payment of certain monies by the said Henry Allanson to the said plaintiff, or by the said plaintiff to the said Henry Allanson, was made to depend on the then future prices of the said *Spanish Cortes Bonds* and *Spanish Scrip*, and thereupon it was then unlawfully agreed between the plaintiff and the said Henry Allanson that there should not be any actual or *bonâ fide* sale or transfer of the said stock, but that in case the price thereof should be less than a certain price, to wit, 67*l.* 7*s.* 6*d.* for 100*l.* in the said stock, and securities at certain times, to wit, the month of June, in the year aforesaid, that the said Henry Allanson should pay the said plaintiff the difference which might then be between the said respective prices; but that if the price of the said stock at these times should be more than the said specified price, then the said plaintiff should pay the said Henry Allanson such difference or excess; that afterwards, to wit, on, &c. the plaintiff requested the said Henry Allanson to give him some security for the balance which might thereafter become due to the said plaintiff, under and by virtue of the said wagers and contracts, and thereupon afterwards, and before any of the said times when the prices of the stock were to be taken as aforesaid, to wit, &c. the said Henry Allanson being possessed of the said bill of exchange, as aforesaid, delivered the same to the said plaintiff as a security for the said balance, which might become due to him the said plaintiff, under and by virtue of the said illegal wagers and contracts, and the plaintiff then took and received the said bill of exchange as such security as aforesaid, and that the plaintiff did not at any time give any consideration whatever for the said bill of exchange, except as aforesaid.

*Replication.*—That the defendant of his own wrong, and without the cause by him the said defendant in his said plea mentioned, broke his said promise in the said declaration mentioned, in manner and form as the plaintiff had above thereof complained against him; and this the plaintiff prayed might be inquired of by the country, &c.

At the trial before Gaselee, J., at the London sittings in *Easter Term*, the defendant gave evidence in support of the plea, but the witnesses did not prove that the sale of the stock was transacted at the price of 67*l.* 7*s.* 6*d.* as stated in the plea, but by the books which were produced, it appeared that the price was 67*l.* 2*s.* 6*d.* It was objected for the plaintiff that the price ought to be strictly proved, but the learned judge overruled the objection, reserving the point, and a verdict was found for the defendant (a).

Kelly obtained a rule *nisi* to set aside the verdict, and to enter a verdict for the plaintiff, upon the above ground of variance.

(a) Another objection was raised at the trial, viz., that jobbing transactions in Foreign Funds were not illegal, but the rule not having been moved to enter a verdict *non*

*obstante*, the plaintiff's counsel were prevented from discussing this point, when the rule came on for argument. See *Morgan v. Pebrer* ante 3.

*Talfourd*, Serjt. and *Cleasby* shewed cause. The rule is, that it is not generally necessary to prove a fact precisely as laid, unless that particular fact be material; 1 *Phillips* on *Ev.* 214. In *May v. Brown* (b), the declaration stated that the plaintiff was an attorney, and had been employed as vestry clerk, and that whilst he was such vestry clerk certain prosecutions were carried on for certain misdemeanors, and in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money belonging to the parishioners were appropriated to the discharge of the expenses incurred; but that the defendant, to cause it to be suspected that the plaintiff had fraudulently applied money belonging to the parishioners, published a libel of and concerning the plaintiff, and of and concerning the matters aforesaid. It appeared on the production of the libel at the trial that the imputation was, that the plaintiff had applied the parish money in payment of the expenses of the prosecution after it had terminated; but the Court held that this was no variance. The rule was then laid down by *Abbott*, C. J., as follows:—

“It is a general rule that a variance between the allegation and the proof will not defeat a party unless it be in respect of matter which if pleaded would be material. If the variance be in respect of matter not essential to maintain the action or the plea, it is of no importance. Then the question to be considered is, whether the matter with respect to which the variance is alleged to exist, with reference to the libel itself, was in any degree essential to support the action?”

So here, the price of the stock was altogether immaterial; the only question at the trial was, whether the bill had been deposited to await the result of certain illegal bargains which had been transacted between the parties, and whether the price of the stock was 60*l.* or 65*l.* made no difference. This case is distinguishable from *Partridge v. Coates* (c), *Fox v. Keeling* (d), and other cases which relate to usury, in which there have been variances as to the time when money was alleged to be lent, because in such cases the time of forbearance is of the very essence of the offence.

*Kelly*, in support of the rule. It was necessary that this plea should set forth the particulars of the contract which was made between the parties. A general statement “that a certain illegal contract was made” would have been bad on special demurrer. The statement of some price was necessary, and as the price was of the essence of the contract, it ought to have been strictly proved. This case is therefore analogous to those which have been cited as to usurious contracts, where it is admitted that the time must be proved, as it is alleged in the pleadings. In *Tuck v. Tooke* (e), where fraud and covin was alleged by particular means, it was held not to be tantamount to an allegation of fraud and covin generally. If the price of the stock may be varied, why may not the defendant be also allowed to show that the transaction occurred in the transfer of English stock, and not of Spanish stock, as alleged in the plea?

TINDAL, C. J.—The plea has been substantially proved. I agree that when a contract is pleaded, and the terms of it are material, the party is not

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(b) 3 Barn. & Cress. 113.

(c) Ry. & Moody, 155.

(d) 2 Ado. & Ellis, 670.

(e) 2 Barn. and Cress. 437.

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relieved from giving precise proof, although the terms are stated under a videlicet. But here the substance of the plea is, that a bill of exchange had been deposited with the plaintiff upon an illegal transaction between him and the depositor, and the plea then sets out the particulars of the contract; but it is perfectly immaterial for the purpose of the plea, whether 67*l.*, or a smaller or a larger sum, was the price agreed upon. The cases which have been cited are those which relate to usurious contracts, which were pleaded to avoid a bill or other instrument. In such cases the plea must state the precise terms of the contract, because the Court must see whether more than legal interest has been taken. There, the time of forbearance is of the very essence of the illegality, but here, it is immaterial whether one sum or another is stated; the substance of the plea is, that the contract was a time bargain and illegal, and the evidence proved that allegation.

PARK, J.—It is totally immaterial whether 67*l.* or 60*l.* is the sum stated. The cases of usury are different; there it is most material to state the particular circumstances.

VAUGHAN, J.—The allegation was substantially proved. This is a different case from those where time and price, and other particulars may be most material.

BOSANQUET, J.—I am of the same opinion.

Rule discharged.

Jan. 16*th*.

### BETTERBY v. MC. LEOD.

1. A witness living at *Camberwell* was subpoenaed by the plaintiff to attend a trial at *Quidhall*, and the witness stated that he had been previously subpoenaed by the defendant, who had paid him a guinea as conduct-money, and the plaintiff then paid him but one shilling with his subpoena. An action was afterwards brought against the witness to recover costs incurred in consequence of his neglect to attend the trial; and the plaintiff alleged in the declaration that he had paid a reasonable sum with the subpoena:—*Held*

CASE against the defendant to recover damages sustained by the plaintiff in consequence of the defendant's neglect to appear in Court to give evidence in a cause of *Betterby v. Mc. Leod*, in which the defendant had been subpoenaed. The declaration stated the service of the subpoena upon the defendant, and averred that there was then "paid to the defendant, a certain sum of money, to wit, the sum of one shilling, being a reasonable sum of money for his costs and charges, in and about his attendance as a witness, according to the tenor and effect of the said writ of subpoena." The defendant pleaded, 1st. Not Guilty; 2ndly. That a reasonable sum of money had not been paid or tendered, when the defendant was subpoenaed. At the trial before *Tindal, C. J.* at the *Middlesex* sittings after *Trinity Term*, it was in evidence that the defendant did not attend at the trial of the cause, and that the plaintiff's attorney, being unable to proceed in consequence of his absence, was compelled to withdraw the record. The clerk to the plaintiff's attorney stated that when he subpoenaed the defendant at his residence at *Camberwell*, the defendant informed him that he had already been served with a subpoena by the defendant in the cause, and that he had received a guinea for conduct-

that this averment was sufficiently proved, by showing the payment of the one shilling.

2. If when a cause is called on, a material witness is absent, the attorney is justified in withdrawing the record, and he is not bound to allow the trial to proceed, to take the chance of the arrival of the witness.

money with that subpoena; the clerk observed that, under those circumstances he supposed the witness would not require to be paid another guinea, to which the defendant replied "Certainly not," and he then received one shilling from the clerk. The jury found a verdict for the plaintiff.

*Com. Pleas.*  
*BETTERBY*  
*v.*  
*MO. LEOD.*

*Platt* obtained a rule *nisi* for leave to enter a verdict for the defendant or for a new trial (a).

*Talfourd* Serjt. and *R. V. Richards* shewed cause, and contended that the allegation in the declaration was supported by the evidence; that after a witness had received a subpoena from one party in a cause, with a sufficient sum of money to enable him to attend at the trial, he has no right to take a further payment on receiving another subpoena from the opposite party. *Benson v. Schneider* (b).

*Platt* and *W. H. Watson*, in support of the rule. If the plaintiff relied upon a special agreement having been made with the witness to attend at the trial, without requiring any money to be paid, then that agreement should have been stated in the declaration, so that the dispensation might appear, *Jones v. Barkley* (c). But here the plaintiff has alleged that a reasonable sum of money was given, and the evidence clearly shows that only one shilling was received by the witness; and the payment of that sum does not amount to such a consideration as enables the plaintiff to sue the defendant in this form of action.

*TINDAL, C. J.*—There is no ground for saying that the verdict is not warranted by the evidence. As to the reasonableness of the sum which was paid to the witness, with the subpoena, that must be measured by the expense which was actually thrown upon him. Here the witness had previously received a guinea from the defendant in the cause, and that was an ample sum to cover any expense which he could be put to in attending at the trial; and it seems by the evidence that the witness himself considered that it was sufficient. The rule must be discharged.

The other Judges concurred.

Rule discharged (d).

(a) It appeared that the sittings commenced at half-past nine o'clock in the morning, at which time the cause was called on; the witness was then absent, whereupon the plaintiff's attorney immediately withdrew the record. In about a quarter of an hour the witness was in attendance, and in moving for the rule it was contended that the record was withdrawn prematurely, and that the

cause ought to have proceeded, in which case the witness would have been in time to give his evidence; but the Court refused to accede to that argument.

(b) 7 Taunt. 272; 1 Moore, 76.

(c) 2 Doug. 684.

(d) The Reporter is indebted to a learned friend for the report of the above case.

Comm. Pleas.

PONTET

v.

THE

BASINGSTOKE

CANAL  
COMPANY.

Jan. 1844.

Where a Canal Company empowered by Act of Parliament to raise money at interest, upon the credit of the undertaking and the rates or duties thereof, and the Company by a deed-poll, under their common seal, assigned their property in the undertaking, and the rates and duties thereof, until a sum of money should be paid with interest, to be paid half-yearly, on certain days which were specified:—*Held*, that an action of covenant could not be maintained against the Company, to recover an arrear of interest due under a deed-poll.

## PONTET, Exor. of J. Gaillard, decd., v. The Company of the BASINGSTOKE CANAL Navigation.

**COVENANT.** The Declaration stated that the defendants, on the 26th of *September, 1793*, according to the statute in such case made and provided, made their deed-poll sealed with their common seal, and thereby made known to all to whom those presents should come, That in pursuance and by virtue of an Act of Parliament made and passed in the 33rd year of the reign of His Majesty King *George the Third*, intituled "An Act for effectually carrying into execution an Act of Parliament of the 18th year of the reign of his present Majesty, for making a Navigable Canal from the Town of *Basingstoke*, in the County of *Southampton*, to communicate with the river *Wey*:" And also of an order made at a general assembly or meeting of the said Company of Proprietors, held by adjournment at the *Crown and Anchor Tavern*, in the *Strand, London*, on the 15th day of *April, 1793*: And in consideration of the sum of 100*l.* to them advanced and paid by the said *Joseph Gaillard*, the receipt whereof was thereby acknowledged, the said Company of Proprietors had granted and assigned, and by that present instrument or writing under their common seal, did grant and assign unto the said *Joseph Gaillard*, his executors, administrators, and assigns, all that the said navigation and undertaking, and the rates or duties granted and made payable by the said Act of the 18th year of the reign of His Majesty, and all their property, estate, right and interest therein; to hold the same unto the said *Joseph Gaillard*, his executors, administrators, and assigns, until the said sum of 100*l.*, together with interest for the same at the rate of 5*l.* per cent. per annum, to commence from the 24th day of *June*, then last past, and to be paid half-yearly (that is to say) on the 25th day of *December* and the 24th day of *June* in every year, should be fully repaid and satisfied. Breach: That the defendants did not keep their covenant in this; to wit, that the interest on the said sum of money was not paid according to the said deed, and that on the contrary thereof, afterwards, to wit, on the 25th day of *December, 1834*, a large sum of money, to wit, &c. became and was due and in arrear for interest upon the said sum for a long space of time, to wit, the space of 19 years before then elapsed, contrary to the force and effect of the said deed, &c. (a).

(a) By 18 Geo. 3. c. 75. several persons were united into and made a body politic and corporate, by the name of "The Company of Proprietors of the Basingstoke Canal Navigation" for carrying the purposes of the Act into execution, by which name they might have perpetual succession, and have a common seal, and also sue and be sued.

By 33 Geo. 3. c. 16, after reciting the last-mentioned Act, and that the said Company of Proprietors were by the said Act authorized and empowered to raise by contribution amongst themselves the sum of 126,000*l.* to defray the expenses thereof; and that the money which the said Company of Proprietors had raised and laid out and expended by virtue and according to the directions of the said Act, together with the interest and

the debts which they had incurred, amounted to more than the sum they were by the said Act authorised to raise; and that the Works directed by the said Act were not completed: It was enacted that it should be lawful for the said Company of Proprietors, and they were thereby empowered from time to time, by virtue of an order made at any general assembly or meeting of the said Company of Proprietors, to borrow and take up at legal or less interest any sum or sums of money upon the credit of the said undertaking, and the rates or duties granted and made payable by the said Act, and by writing under their common seal to mortgage or assign over the said undertaking, and the said rates or duties, to the person or persons who should advance or lend such money, or his or their trustee or trustees, as a security for the money

money with that subpoena; the clerk observed that, under those circumstances he supposed the witness would not require to be paid another guinea, to which the defendant replied "Certainly not," and he then received one shilling from the clerk. The jury found a verdict for the plaintiff.

*Com. Pleas.*  
*BETTERBY*  
*v.*  
*Mc. LEOD.*

*Platt* obtained a rule *nisi* for leave to enter a verdict for the defendant or for a new trial (a).

*Talfourd* Serjt. and *R. V. Richards* shewed cause, and contended that the allegation in the declaration was supported by the evidence; that after a witness had received a subpoena from one party in a cause, with a sufficient sum of money to enable him to attend at the trial, he has no right to take a further payment on receiving another subpoena from the opposite party. *Benson v. Schneider* (b).

*Platt* and *W. H. Watson*, in support of the rule. If the plaintiff relied upon a special agreement having been made with the witness to attend at the trial, without requiring any money to be paid, then that agreement should have been stated in the declaration, so that the dispensation might appear, *Jones v. Barkley* (c). But here the plaintiff has alleged that a reasonable sum of money was given, and the evidence clearly shows that only one shilling was received by the witness; and the payment of that sum does not amount to such a consideration as enables the plaintiff to sue the defendant in this form of action.

**TINDAL, C. J.**—There is no ground for saying that the verdict is not warranted by the evidence. As to the reasonableness of the sum which was paid to the witness, with the subpoena, that must be measured by the expense which was actually thrown upon him. Here the witness had previously received a guinea from the defendant in the cause, and that was an ample sum to cover any expense which he could be put to in attending at the trial; and it seems by the evidence that the witness himself considered that it was sufficient. The rule must be discharged.

The other Judges concurred.

Rule discharged (d).

(a) It appeared that the sittings commenced at half-past nine o'clock in the morning, at which time the cause was called on; the witness was then absent, whereupon the plaintiff's attorney immediately withdrew the record. In about a quarter of an hour the witness was in attendance, and in moving for the rule it was contended that the record was withdrawn prematurely, and that the

cause ought to have proceeded, in which case the witness would have been in time to give his evidence; but the Court refused to accede to that argument.

(b) 7 Taunt. 272; 1 Moore, 76.

(c) 2 Doug. 684.

(d) The Reporter is indebted to a learned friend for the report of the above case.



*Com. Pleas.*  
**PONTET**  
*v.*  
**The**  
**BASINGSTOKE**  
**CANAL**  
**COMPANY.**

engaged, if they were held to be so liable. It appears to me that the terms of this contract are satisfied by giving the plaintiff security on the undertaking, and his remedy would be by taking possession of the rates, and satisfying his debt.

VAUGHAN, J.—I am of the same opinion. The clause in the statute, which declares that there shall be no priority, shews that the action would at all events be stopped by an injunction from a Court of Equity.

Judgment for defendant.

## DOE, d. BATH, v. CLARKE.

Jan. 1864.

In Ejectment the lessor of the plaintiff claimed as heir-at-law of one *Bath*, through a younger son. The defendant who claimed an interest in the premises, set up as a defence, that the true heir of *Bath* was the grandson of his eldest son, and that he was then living; and to prove this the grandson was called by the defendant as a witness:—*Held*, that he was a competent witness.

**EJECTMENT**, tried before Lord *Abinger*, C. B., at the last *Guildford* Assizes. The lessor of the plaintiff claimed to recover certain rectorial tithes, as heir-at-law of one *Thomas Bath*, who died in 1746. It was in evidence that *Thomas Bath* had four sons, viz. *John*, the eldest, *Thomas*, *Andrew*, and *Henry*, and evidence was given that the lines of *John*, *Thomas*, and *Andrew* had failed altogether, and that the lessor of the plaintiff was great-grandson and heir-at-law of *Andrew*, the youngest son. For the purpose of shewing that the lessor of the plaintiff had no right to recover the premises, the defendant contended that the line of descent through *John*, the eldest son of *Thomas Bath*, was not extinct; and a witness was called, who stated that he was the grandson of this *John Bath*. The counsel for the lessor of the plaintiff objected that this witness was interested, and therefore incompetent; but the learned judge received the evidence, and a verdict was found for the defendant.

*Platt* obtained a rule *nisi* for a new trial, in pursuance of leave reserved, upon the ground that this evidence ought not to have been received.

*Thesiger* and *Channell* shewed cause. The general rule on the subject of interested witnesses is clearly laid down in 1 *Phillips* on *Ev.* 55:—"If the verdict can be used in evidence against the witness, in case the party for whom he is called should fail in the action; or if the witness can avail himself of the verdict, so as to give it in evidence in support of his own claims, this is a direct and immediate interest in the event of the suit, which will render him incompetent." This rule has been acted upon in *Bent v. Baker* (a), and many other cases. In *Smith v. Prager* (b), Lord *Kenyon*, C. J. said, "The case of *Bent v. Baker* (a) laid down a clear and certain rule, by which I have ever since endeavoured to regulate my opinion. The rule there laid down was, that no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." Here the witness had no such direct and immediate interest.

(a) 3 T. Rep. 27.

(b) 7 T. Rep. 62.

in the result of the cause; the verdict would neither remove any liability nor would it procure any advantage affirmatively to the witness. A mere facility to substantiate a claim, which may be gained by a witness, will not disqualify him. That was determined in *Doe d. Nightingale v. Massy* (c), where the question was, whether the mother of a defendant in ejectment, who claimed to retain possession of the premises as heir-at-law to his father, was a competent witness for the defendant, and Lord Tenterden, C. J., said, "The question in this case was, whether the mother of the defendant was an incompetent witness, inasmuch as she would be entitled to dower if her husband were seized. On consideration we are all of opinion she was competent. She had no interest of which the law as to evidence takes notice, in the event of the suit. The judgment in the action would be no evidence of the husband's seisin. If he was seized she is equally entitled to dower, whether the premises be in the hand of the defendant or the lessor of the plaintiff." Then can this verdict be given in evidence for the witness on any future occasion in support of his own interest? It is quite clear that it cannot; *Nix v. Cutting* (d), is an express authority. That was an action of trover for a horse, and the question was, whether one *Denny*, who gave evidence on the part of the defendant, was an admissible witness. He stated that it was agreed between the plaintiff and himself, that he should take the horse as a security for the payment of 15*l.* deposited by him with the plaintiff, and that the horse should be sold at the next *Woodbridge* fair, if the money was not paid by that time: the money was not paid, and the witness sold the horse at *Woodbridge* fair to the defendant. A rule having been obtained for a new trial, on the ground that this evidence ought not to have been received, this Court confirmed the opinion of *Grose, J.*, at *nisi prius*, that the evidence was admissible on the ground that the verdict would not be evidence in favour of the witness in any case. That case was subsequently fully confirmed in *Ward v. Wilkinson* (e), where it was held that in trover, a witness who was called for the defendant, was competent to prove the property in the goods to be in himself. This case is altogether distinguishable from *Doe d. Lord Teynham v. Tyler* (f), where a remainder man was held not to be a competent witness, because there the witness was interested in the result of the suit.

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*Platt* in support of the rule:—The defendant's case depended entirely upon the existence of another heir-at-law, and although the defendant defended the action as landlord of the premises, it does not necessarily follow that he therefore claimed the inheritance. [*Tindal, C. J.*—The title of the witness was set up to shew that the lessor of the plaintiff had no right to the property; *non constat*, that the estate had not been conveyed away by the heirs of *John Bath*.] The defendant must have claimed by an adverse or a consistent title to that of the witness. If by a consistent title, then the defendant must claim to hold under the same title as the witness, but if he claims by an inconsistent title, then this verdict might be given in evidence in favour of the witness, to enable him to recover the mesne profits of the estate.

(c) 1 Barn. & Ado. 439.  
(d) 4 Taunt. 412.

(e) 4 Barn. & Ald. 411.  
(f) 6 Bing. 390.

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DOE d. BATH

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CLARKE.

TINDAL, C. J.—It appears to me that this rule must be discharged. The lessor of the plaintiff claimed to recover in the action, as heir-at law, through the line of a younger son of *Thomas Bath*. For the purpose of defeating this claim, the defendant, who claimed an interest in the premises, offered to prove that *Thomas Bath* had an elder son, whose heir was still in existence, and it is not necessary to say that this evidence would have prevented the lessor of the plaintiff from recovering in the action, whether the defendant had any title or not. The defendant then called the grandson of that elder son as a witness, and the question is, whether this person was a competent witness. It is well established that the only ground of objection is where a witness has an immediate interest in the result of the suit, or where he may use the verdict in his own favour on any future occasion. First, had this witness any interest in the suit? If the defendant had shown that he was holding the property as tenant to the witness, then the effect of a verdict for the lessor of the plaintiff would be to turn the defendant out of possession, and the witness would in that case have been interested. Now the party who raised this objection should show this to be the case, but here there is no proof whatever that the witness was in any manner interested in the result of the suit.

Then could this verdict be used in the witness's favour in any future action? This is a verdict in favour of the defendant, and I cannot see how it could be used. It is said that the evidence given by the witness might be used in a subsequent action. I agree that his statements would be evidence against him; but they could not be used in his favour. The case, therefore, seems to me to fall precisely within the principle of *Nix v. Cutting* (g), and *Ward v. Wilkinson* (h).

PARK, J.—The rules of evidence have not been so well considered in the older, as in some of the more modern decisions. I remember the decision in *Bent v. Baker* (i), a case where great pains were taken, and the rule as then laid down by Mr. *J. Buller* was afterwards approved of by Lord *Kenyon*, in *Smith v. Prager* (j); and in *Doe d. Nightingale v. Massy* (k), the rule was again confirmed. This case seems to me to fall within that rule, and I concur with the rest of the Court.

VAUGHAN, J.—I am of the same opinion. The rule affecting this question is also to be found in *Doddington v. Hudson* (l). Here the witness had no such interest as would exclude his testimony. *Nix v. Cutting* (g), is also in point, and it does not seem to me that any distinction can be taken between the rule as to personal chattels and real property.

Rule discharged.

(g) 4 Taunt. 18.  
(h) 4 Barn. & Ald. 411.  
(i) 3 T. Rep. 27.

(j) 7 T. Rep. 64.  
(k) 1 Barn. & Ald. 439.  
(l) 1 Bing. 257.

## VAUGHAN v. MENLOVE.

**CASE.**—The declaration stated that before, and at the time of the grievance and injury hereinafter mentioned, certain premises, to wit, two cottages, with the appurtenances, situate in the county of *Salop*, were respectively in the respective possessions and occupations of certain persons as tenants thereof to the plaintiff; to wit, one thereof in the possession and occupation of one *Thomas Ruscoe*, as tenant thereof to the plaintiff, the reversion of and in the same, with the appurtenances then belonging to the plaintiff, and the other thereof in the possession and occupation of one *Thomas Dickley*, as tenant thereof to the plaintiff, the reversion of and in the same, with the appurtenances then belonging to the plaintiff. And the defendant was then possessed of a certain close near to the said cottages, and of certain buildings of wood and thatch also near to the said cottages; and the defendant was then also possessed of a certain rick or stack of hay before then heaped, stacked, and put together, and then standing and being in and upon the said close of the defendant; and the plaintiff further saith that heretofore, to wit, on, &c. while the said cottages so were in the occupation of the said tenants, and while the reversion thereof respectively so belonged to the plaintiff as aforesaid, the said rick or stack of hay of the defendant was liable and likely to ignite, to take fire, and break out into flame, and there had appeared, and were just grounds to apprehend and believe that the same would ignite, take fire, and break out into flame; and by reason of such liability, and of the state and condition of the said rick or stack of hay, the same then was and continued dangerous to the said cottages; of which said several premises the defendant then had notice; yet the defendant, well knowing the premises, but not regarding his duty in that behalf, on the day and year aforesaid, and from thence until and upon a certain day, to wit, &c. wrongfully, negligently, and improperly kept and continued the said rick or stack of hay, so likely and liable to ignite and take fire, and in a state and condition dangerous to the said cottages, although he could and might and ought to have removed or altered the same rick, so as to prevent the same from being and continuing so dangerous as aforesaid, and by reason whereof the said cottages for a long time, during all the time aforesaid, were in great danger of being consumed by fire. And the plaintiff further says, that by reason of the premises, and of the carelessness, negligence, and improper conduct of the defendant in so keeping and continuing the said rick or stack in a state or condition so dangerous as aforesaid, and so liable and likely to ignite and take fire and break out into flame, on the day and year last aforesaid, and while the said cottages so were occupied as aforesaid, and the reversion thereof respectively so belonged to the plaintiff as aforesaid, the said rick or stack of hay of the defendant standing in the close of the defendant, and near to the said cottages, did ignite, take fire, and break out into flame, and by fire and flame thence issuing and arising, the said buildings of the defendant so being of wood and thatch as aforesaid; and so being near to the said rick or stack as aforesaid, were set on fire, and thereby and by reason of the carelessness, negligence, and improper conduct of the defendant in so keeping and continuing the said rick or stack in such condition as aforesaid, fire and flame so occasioned as aforesaid by the igniting and

Jan. 23.

An action on the case was brought against the defendant for negligently and carelessly allowing a new rick of hay to ignite, whereby certain cottages belonging to the plaintiff were burnt. At the trial the judge in summing up told the jury, that it was not sufficient for the defendant to show that he had acted *bona fide*, and had done every thing he thought best to prevent an accident; but that he must prove that he acted as a prudent, not as a rash man would have done under similar circumstances, and that if they were satisfied the defendant had been guilty of gross negligence the plaintiff was entitled to a verdict:—*Held*, that this direction was correct, and a verdict which had been found for the plaintiff was ordered to stand.

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breaking out into flame by the said rick or stack, was thereupon then communicated into the said cottages, in which the plaintiff was so interested as aforesaid, which were thereby then respectively set on fire; and then, to wit, on the day and year last aforesaid, by reason of such carelessness, negligence, and improper conduct of the defendant, in so continuing the said rick or stack in such a dangerous condition as aforesaid, in manner aforesaid, were consumed, damaged, and wholly destroyed, the cottages being of great value, to wit, the value of 500*l.*; and by means of the premises the plaintiff has been and is greatly and permanently injured in his said reversionary estate and interest of and in each of them, to the plaintiff's damage of 500*l.*; and thereupon he brings his suit, &c.

*Pleas.*—First, Not Guilty.—Second, that the said rick or stack of hay in the said declaration mentioned was not while the said cottages so were in the occupation of the said tenants thereof respectively, and while the reversion thereof respectively belonged to the plaintiff, likely to ignite, take fire, and break into flame, nor did there appear any just grounds to apprehend and believe that the same would ignite, take fire, and break into flame, nor was the same by reason of such liability, and of the state and condition of the said rick and stack of hay dangerous to the said cottages; nor had the defendant notice of the said premises in manner and form as the plaintiff hath in and by his said declaration in that behalf alleged. Conclusion to the country.

*Third Plea.*—That the said defendant did not, well knowing the premises in the said declaration in that behalf mentioned, wrongfully, negligently, or improperly keep or continue the said rick or stack of hay in a state and condition dangerous to the said cottages, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged. Conclusion to the country.

*Fourth plea.*—That the said rick or stack of hay did not by reason of the carelessness, negligence, and improper conduct of the said defendant in that behalf, ignite, take fire, and break out into a flame, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged. Conclusion to the country.

*Fifth plea.*—That the said cottages were not consumed, damaged and destroyed by reason of the carelessness, negligence, and improper conduct of the said defendant in that behalf mentioned, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged. Conclusion to the country.

At the trial before *Patteson, J.*, at the last *Shropshire Assizes*, the following facts were in evidence. The defendant had made a rick of hay near a barn which belonged to him, and the plaintiff was the owner of some cottages which were adjacent to the barn. The rick, which was made of grass carried in a damp condition, exhibited signs of being in a very heated and dangerous state for several days, and the neighbours warned the defendant that if he did not shift the hay, the rick would ignite, and they offered to assist in making a new rick. The defendant ordered a hole to be cut through the centre of the rick, but it continued to smoke for two or three days, and some of the bystanders urged him to take other preventive measures; but, after consulting other bystanders, who said that no danger

was to be apprehended, he refused to do so, and said "he would chance it." The rick subsequently ignited, and was burnt, together with the defendant's barn, in which was a quantity of corn, and the fire spread from the barn to the plaintiff's cottages, which were also destroyed. In summing up, the learned judge told the jury that it was not sufficient for the defendant to shew that he had acted *bonâ fide*, and had done everything which he thought best to prevent an accident, but that he must shew that he exercised reasonable caution, and that he acted as a prudent, and not as a rash man would do under similar circumstances. At the close of the summing up, his lordship added, that if the jury believed it was an accident, the defendant was entitled to a verdict; but if they thought the defendant had been guilty of gross negligence, then that the plaintiff was entitled to recover. The jury found a verdict for the plaintiff, damages 400*l*.

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*Maule* obtained a rule *nisi* for a new trial, upon the ground of misdirection.

*Talfourd*, Serjt. and *Whateley* shewed cause.—This is not an application to arrest the judgment; and similar actions to this have been brought, and where the defendant has been guilty of carelessness, no objection has been made upon the ground that such an action cannot be maintained (*a*). The learned judge's summing up was perfectly correct. He referred the jury to the various issues which were raised, and particularly to that which related to the notice of the danger which was given to the defendant. It is clear that the defendant was put upon his guard by his neighbours, but, according to his own words, he chose "to chance it." This he might do as it respected his own property, but he was not justified in putting his neighbour's property in any danger. He knew that the hay was carried in such a damp and unwholesome state as was likely to produce spontaneous combustion, and that ought to have made him the more careful, when the rick presented an unfavourable appearance. The discussion of the degrees of caution and prudence, which is necessary in taking bills of exchange, which arose in *Gill v. Cubitt* (*b*), *Crook v. Jadis* (*c*), and other cases, is not applicable to the present case. Here the evidence was left to the jury upon the question of gross negligence, and they were fully warranted in finding their verdict in favour of the plaintiff. It is to be observed that the plea of Not Guilty, put the scier of the defendant in issue, *Thomas v. Morgan* (*d*).

*R. V. Richards* in support of the rule.—No reliance was put by the plaintiff at the trial, upon the fact that the hay was improperly made, but it was rather assumed that the defendant had not been careless in that respect. Here the defendant's barn must have been burnt before the fire could spread

(*a*) *Talfourd*, Serjt., mentioned a case tried before *Alderson, B.*, at the *Berks* Assizes, a few years ago, in which *Talfourd* appeared for the defendant, and *Maule* for the plaintiff. The plaintiff was the owner of a wood adjoining to the defendant's field, in which his servants were burning weeds, and in doing so they set fire to the wood. The

learned Serjeant said that he did not object at the trial, that the action could not be maintained, but the question raised was, whether the defendant's servants had exercised due caution.

(*b*) 3 Barn. & Cress. 466.

(*c*) 5 Baro. & Adol. 509.

(*d*) 2 Cr. M. & Roscoe; 1 Gale, 172.

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VAUGHAN  
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to the plaintiff's cottages, and the defendant had therefore the strongest possible motive for adopting the best mode to preserve the rick from igniting. The defendant was not in the situation of a bailee for reward, and no contract can be implied between him and the plaintiff. As this case was left to the jury, it was difficult for them to understand the meaning of gross negligence, because they had been previously told that it was not sufficient if the defendant *bonâ fide* meant to do for the best. The degrees of prudence vary in different individuals, but a man who acts according to the best of his judgment, cannot be said to be guilty of gross negligence. In *Crook v. Jadis* (e), a distinction is taken between gross negligence, and the care to be taken by a prudent man; and *Patteson, J.*, there said, "I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicions of a prudent man." But here the question was so involved, that the distinction between the degrees of negligence was not put to the jury with sufficient accuracy.

TINDAL, C. J.—This is a case *primæ impressionis*, but I feel no difficulty in laying down the principle upon which it must be determined. It is not a case of bailment, but it depends upon the rule that a man must so use his own property that he shall do no hurt to his neighbour, and that rule is applicable not only where there is a direct injury, but also where the injury is occasioned through want of due care and caution. So here, although the defendant did not himself set fire to the rick, he is nevertheless immediately the cause of its being fired, because it is a natural consequence of heaping up hay in a certain state, that ignition will take place. In *Turberth v. Stamp* (f), a fire had been made in a field, and was so negligently kept that it burnt the corn in another close, and it was held that the defendant was liable. "For the fire in his field is his fire as well as that in his house: he made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen, which he could not stop, it was matter of evidence, and he should have showed it." So if experiments are made in trade, without due caution, and a fire is caused by combustion, no doubt there would be a remedy for a party who was injured, and there can be no doubt but that this injury may be the subject matter of an action on the case. Then it is said that the judge mistook the extent of the defendant's liability. The evidence was left to the jury upon the question of gross negligence; but it is contended that this was so mixed up with the observations as to ordinary care and prudence, that the jury could not properly entertain the question. It is said to be sufficient that the defendant should act honestly and *bonâ fide*, and it is objected that the degrees of prudence and care used by different individuals are so various as to afford a vague and uncertain rule, because it is impossible to say what the habits of various men may be. But this rule is universally acknowledged in the Law of Bailments, which in most instances agrees with the civil law, and in *Coggs v. Bernard* (g), Lord Holt speaks of the various degrees of diligence which are required in the different species of bailment. Speaking of one species, he cites *Bracton*, who says "*Talis ab eo*

(e) 5 B. & Ado. 910.  
(f) Salk. 13.

(g) Lord Ray, 916.

*desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet.*" This is said to be unintelligible: that is so, until the circumstances of each particular case are known; but when they are furnished, the application of the rule becomes clear; and in the present case I should have felt no hesitation in saying that the defendant was guilty of very gross and improper negligence.

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PARK, J.—I am of the same opinion. A man must so use his own property that he shall not injure his neighbour, which is the principle upon which the *Berkshire* case, as well as *Turbervil v. Stamp* (h), was decided. As to the summing up of the learned judge, it was perfectly correct: it was properly left to the jury to say whether the defendant had been guilty of gross negligence; and no doubt the jury, after hearing that he had been warned of the danger over and over again, were perfectly satisfied that the charge of gross negligence was proved.

GASELKE, J., concurred.

VAUGHAN, J.—The principle upon which this case is decided is by no means new. Unless the jury had been satisfied of the existence of negligence, and gross negligence, they would have found a verdict for the defendant; but every witness proves that he was guilty of both. I agree that this rule must be discharged.

Rule discharged.

(h) Salk. 13.

### LOWNE v. LOADER.

**HUMFREY** obtained a rule *nisi* to set aside a judgment, upon the ground that it was signed after the clerk to the plaintiff's attorney had given four days' time to plead.

*Bompas*, Serjt., shewed cause upon an affidavit, which stated that the consent to give four days' further time to plead was given in consequence of the defendant's clerk having served the plaintiff's attorney with a paper which purported to be a judge's summons to shew cause why the defendant should not have further time to plead; but that the plaintiff's attorney afterwards ascertained that no such summons had been obtained from a judge, and thereupon the plaintiff signed judgment. The affidavits were contradictory as to whether the defendant's attorney had acted upon the consent so given, by serving a copy of a judge's order for the time to plead, upon the plaintiff's attorney.

Jas. 24.  
When further time to plead was given by the plaintiff's attorney upon being served with a paper which purported to be a judge's summons for time to plead:—*Held*, that the attorney was justified in signing judgment for want of a plea, after he had discovered that no judge's summons had been issued.

*Humfrey* contended that no fraud was intended by the defendant's attorney, and that it was not an uncommon practice for parties to attend to summonses which were not obtained at the judges' chambers, especially



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where the residences of the parties were so distant as to make it very inconvenient to obtain a summons.

TINDAL, C. J.—The defendant's attorney was guilty of a gross impropriety in fabricating this summons. It is a very serious matter; indeed it is a forgery of the judge's signature. The rule must be discharged with costs.

PARK, J., and VAUGHAN, J., concurred.

Rule discharged.

### WILKINSON v. HALL and another (a).

Jan. 27—30.

The defendants entered into the following agreement:—"That they should become tenants of Botolph Wharf at 375*l.* a quarter, the tenancy to commence on the 14th of June, they paying a quarter's rent on that day; & that they should give security to pay one quarter's rent in advance as long as they should continue tenants;" and in a Bond given as a security for the rent it was recited, "That the defendants had become tenants of Botolph Wharf at the rent of 375*l.* a quarter, and had paid the first quarter's rent, and had agreed to pay the said sum of 375*l.* on or before the first day of every quarter during which they should hold the premises:"—*Held*, that this was a quarterly tenancy.

An estate was mortgaged in fee, subject to the usual proviso for redemption on payment of the principal and interest, on the 5th June 1834. It was further provided, that the mortgagor should not be entitled to call in the principal money before December 1840, if the interest was in the mean time regularly paid; and the mortgage deed contained a covenant that the mortgagor should hold, occupy and enjoy the estate until default should be made in payment of the principal or interest contrary to the before-mentioned provisos:—*Held*, that this amounted to a lease of the premises by the mortgagee to the mortgagor until December 1840.

Whether a quarterly tenant, who wilfully holds over after his tenancy is expired, is liable to pay double value to his landlord under 4 Geo. II., c. 28.—*Quære*.

(a) See *Wilkinson v. Hall*, 1 Hodges, 170.

(b) The first count of the declaration was as follows:—"For that whereas the said defendants before and at the time of giving of the notice to quit and making the demand as hereinafter mentioned, and from thence until a certain day, to wit, the 14th day of June, 1834, held and enjoyed one undivided moiety or half part, the whole into two equal parts to be divided, of and in certain tenements, to wit, a certain quay or wharf and certain warehouses vaults and buildings, with the appurtenances, as tenants thereof to the said plaintiff; that is to say, as tenants thereof for a term of years, that is to say, from year to year, for so long a time as the plaintiff and the defendants should respectively please; and the defendants during all the time aforesaid held and enjoyed the other undivided moiety of the said tenements with the appurtenances as tenants thereof to one William Stennett (that is to say), as such tenants thereof for a term of years (that is to say) from year to year for so long a time as the said William Stennett and the said defendants should respectively

please, the reversion of and in the said first mentioned one undivided moiety of the said premises with the appurtenances, during all that time belonging to the said plaintiff, and the reversion of and in the other undivided moiety thereof, during all that time belonging to the said William Stennett; and thereupon, heretofore, and whilst the said defendants so held and enjoyed the said first mentioned one undivided moiety of the said tenements with the appurtenances as tenants thereof to the said plaintiff, and the said other undivided moiety thereof as tenants thereof to the said William Stennett as aforesaid, and whilst the said reversion of and in the said first mentioned one undivided moiety thereof so belonged to the said plaintiff, and whilst the said reversion of and in the said other undivided moiety thereof so belonged to the said William Stennett as aforesaid, to wit, on the 11th day of December, 1833, he the said plaintiff and the said William Stennett and each of them gave notice in writing to the said defendants, and thereby demanded of and required the defendants to quit and

on the 13th day of *June* 1834, and claiming double value from that day to the 6th day of *April* 1835, when the defendants quitted possession. The second founded on a three months' notice to quit, which expired on the 13th day of *December* 1833, and claiming double value from that day to the before-mentioned 6th day of *April* 1835. The declaration also contained a count for use and occupation, claiming the single rent for six months from the before-mentioned 13th day of *December* 1833, to the before-mentioned 13th day of *June* 1834.

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deliver up the possession of the said tenements, with the appurtenances, to them the said plaintiff and the said *William Stennett* or to either of them; that is to say, possession of the said first mentioned undivided moiety to him the plaintiff or the said *William Stennett*, and the possession of the said other undivided moiety thereof to the said *William Stennett* or the plaintiff, on the said 14th day of *June* 1834, provided the said defendants' tenancy of the said premises originally commenced at that period of the year, or otherwise to quit and deliver up the possession of the said premises, that is to say, of the said first mentioned undivided moiety thereof, to the said plaintiff or the said *William Stennett*, and the possession of the said other undivided moiety thereof, to the said *William Stennett* or the plaintiff, at the end of the current year of their tenancies, which should expire next after the end of half a year from the time of their being served with the said notice. And the said plaintiff avers, that the said term and tenancy of the said first mentioned undivided moiety of and in the tenements with the appurtenances, the reversion of and in which so belonged to him the plaintiff as aforesaid, and the said term and tenancy of and in the said other undivided moiety of the said tenements with the appurtenances, the reversion of and in which so belonged to the said *William Stennett* as aforesaid afterward, to wit, on the 14th day of *June* 1834, ended and were and each of them was duly determined by the said notice. And the said plaintiff in fact further says, that after the determination of the said tenancy of the said defendants of and in the said first mentioned undivided moiety of the said tenements with the appurtenances, the reversion of and in which so belonged to the plaintiff as aforesaid, and after the determination of the said tenancy of the said defendants of and in the said other undivided moiety of the said tenements with the appurtenances, the reversion of and in which so belonged to the said *William Stennett* as aforesaid, and whilst the defendants continued in possession of the entirety of the said tenements, with the appurtenances as aforesaid, and the said plaintiff was so entitled to the possession of the said first mentioned undivided moiety thereof; and whilst the said *William Stennett* was so entitled to the possession of the said other undivided moiety thereof as aforesaid, to wit, on the said 14th day of *June* 1834, the said plaintiff and the

said *William Stennett* by a certain notice in writing then made and signed by him the plaintiff and the said *William Stennett* and delivered to the said defendants, demanded and required the said defendants to deliver the possession of the said tenements with the appurtenances to the said plaintiff and the said *William Stennett*, that is to say, the plaintiff thereby demanded and required the defendants to quit and deliver up the possession of the first mentioned undivided moiety of the said tenements with the appurtenances, to him the said plaintiff or to the said *William Stennett*, and the said *William Stennett* thereby required the defendants to quit and deliver up the possession of the said other undivided moiety of the said tenements with the appurtenances to him the said *William Stennett* or the plaintiff.

Averment.—That the defendants did not deliver up the possession of the premises according to the said notice and demand, but wilfully held over the same—concluding with an averment of the value of the premises, &c.

Second Count.—And whereas also, the said defendants heretofore and before the giving of the notice and making the demand in writing as in this count mentioned, to wit, on the 3rd day of *December* 1833, and from thence until a certain day, to wit, the 14th day of *December* in the same year, held and enjoyed one undivided moiety of certain tenements with the appurtenances, situate in the city of *London*, as tenants thereof to the said plaintiffs; that is to say, as tenants thereof for the residue and remainder of a certain tenancy for a term of years to them the said defendants theretofore, to wit, on the 12th day of *June* 1832, granted, the reversion of the one undivided moiety in this count first mentioned of the said tenements with the appurtenances in this count mentioned, during all that time belonging to the said plaintiff, and the defendants during all the time aforesaid held and enjoyed the other undivided moiety of the tenements in this count mentioned with the appurtenances, as tenants thereof to the said *William Stennett* for the residue and remainder of the said term, the reversion of and in the last mentioned moiety of the said tenements, with the appurtenances, during all that time belonging to the said *William Stennett*, and the said respective tenancies and terms afterwards, to wit, on the 14th day of *December* 1833, were and each of them was

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To the first count the defendants pleaded, first, that they did not hold the said moiety of the premises as tenants thereof to the plaintiff for the term or time in that count mentioned; secondly, that the reversion of and in the said moiety of the premises did not belong to the plaintiff as in that count alleged; thirdly, that the plaintiff did not give such notice in writing to the defendants, or thereby demand of and require the defendants to quit and deliver up the possession of the said moiety of the premises as in that count alleged; and fourthly, that the supposed term and tenancy of the said moiety of the premises was not ended or determined as in that count alleged.

To the second count the defendants pleaded, first, that they did not hold the said moiety of the premises as tenants thereof to the plaintiff for the residue and remainder of the supposed tenancy and term of years in that count mentioned; secondly, that the reversion of and in the said moiety of the premises did not belong to the plaintiff as in that count alleged; and thirdly, that the supposed tenancy and term of years of and in the said moiety of the premises was not ended or determined as in that count alleged.

And to the third count the defendants pleaded, that they never were indebted to the plaintiff as in that count alleged. Upon all these pleas issue was joined.

At the trial before *Tindal, C. J.*, at the *London* adjourned sittings after *Trinity Term 1835*, the jury found as a fact the single yearly value of the entire premises to be *1841*l.**, which finding as to the value was to be binding on the parties. In other respects the jury, with leave of the learned judge, and by the consent of the said defendants, found a verdict *pro forma* for the plaintiff, such verdict to be subject to the opinion of this Court upon the following

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On the 12th *June 1832*, the premises in question then belonging to his Majesty, and being then vested in the *Lords Commissioners of his Majesty's Treasury*, in trust for his Majesty, or the secretary for the time being to the said commission, for the use and service of his Majesty's Customs, the defendants entered into an agreement, of which the following is a copy:—  
 “That Messrs. *Hall* should become tenants of *Botolph Wharf* at *375*l.** a quarter, the tenancy to commence on *Thursday* the 14th of *June*, they paying a quarter's rent on that day. That Messrs. *Hall* should give security to be approved of by the *Commissioners of Customs*, to pay one quarter's rent in advance as long as they continue tenants. That they should also give

determined and ended, and the said plaintiff and the said *William Stennett* after the determination thereof, to wit, on the 16th day of *December 1833*, duly demanded possession of the said tenements from the said defendants, that is to say, the plaintiff, the possession of the said undivided moiety in this count first mentioned of the said tenements with the appurtenances, and the said *William Stennett* possession of the said other undivided moiety of the said tenements with the appurtenances. And the plaintiff and the said *William Stennett* then gave a certain notice in writing to the said defendants, requiring them to deliver the possession of the said tenements to the said *Wil-*

*liam Stennett* or either of them; that is to say, the possession of the said undivided moiety in this count first mentioned of the said tenements with the appurtenances to him the said plaintiff or to the said *William Stennett*, and the said *William Stennett* the possession of the other undivided moiety of the said tenements with the appurtenances to him the said *William Stennett* or to the plaintiff.

Averment.—That the defendants did not deliver up the possession of the premises according to the said notice and demand, but wilfully held over the same—concluding with an averment of the value of the premises. &c.

security to account for and pay over to the *Commissioners of Customs*, for the benefit of the assignees, such sums as they may receive for rent for goods due prior to the 14th of *June* immediately upon being required to do so. *June* 12th, 1832."

This agreement was signed by *W. J. Hall* as agent for and on behalf of the defendants, and by *J. G. Walford* as solicitor for the *Commissioners of Customs*, and agent for and on behalf of their secretary for the time being. On the 13th *June* 1832 the defendants, with one *Lawrence Thompson* as their surety, entered into a bond, of which the following is a copy:—

Know all men by these presents, that we, *William Hall* the elder, and *Thomas Spencer Hall* and *Lawrence Thompson*, are held and firmly bound unto our Sovereign Lord *William the Fourth* by the grace of God, of the United Kingdom of *Great Britain and Ireland*, King, defender of the faith, in the sum of 700*l.* of good and lawful money of *Great Britain*, to be paid to our said Lord the King, his heirs and successors; to which payment well and truly to be made we bind ourselves, &c.

Whereas the above bounden *William Hall* and *Thomas Spencer Hall* have this day become tenants to *Charles Andrew Scovell*, Esq., secretary to the *Commissioners of Customs*, in trust for his Majesty, of certain premises called *Botolph Wharf*, at the rent of 375*l.* a quarter; and whereas the said *William Hall* and *Thomas Spencer Hall* have this day paid to the said *Charles Andrew Scovell*, in trust for his Majesty, the sum of 375*l.* for the first quarter's rent, and have agreed to pay the said sum of 375*l.* on or before the first day of every quarter during which they hold the said premises; and whereas also there are certain sums due and payable for warehouse rent from certain parties, in respect of goods landed and warehoused at the said premises. Now the condition of this obligation is such, that if the said *William Hall* and *Thomas Spencer Hall* shall well and truly pay to the said *Charles Andrew Scovell* or his successors, the sum of 375*l.* on or before the first day of every quarter during which they hold the said premises, and shall at all times well and truly account to the said *Charles Andrew Scovell*, or to such person as he shall appoint for that purpose, for all sums received by them, or any of them, due and payable on account of warehouse rent as aforesaid, and shall permit and suffer the said *Charles Andrew Scovell*, or any person appointed by him, to inspect all books, papers and writings, in their or any of their custody relating to such last-mentioned sums, then this obligation to be void; otherwise to remain in full force and virtue.

By indentures of lease and release, bearing date 2nd and 3rd *December* 1833, the premises called *Botolph Wharf* were conveyed by the Lords of the Treasury and the Commissioners and Secretary of the Customs to the plaintiff, and to his partner *William Stennett*, their heirs and assigns, to the uses therein declared; that is to say, as to one moiety to such uses and upon such trusts as the plaintiff should by deed or deeds direct, limit, or appoint; and in default thereof, or if incomplete, to the use of the plaintiff and his assigns for life, remainder to one *John Knill Kinsman*, his executors, administrators and assigns, during the life of the plaintiff, in trust for the plaintiff, remainder to the use of the plaintiff, his heirs and assigns, for ever. Similar uses were limited and declared as to the other moiety in favour of *William Stennett*. The defendant then gave in evidence certain indentures of lease, appointment and release, bearing date respectively the 4th and 5th *December* 1832.

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By the latter deed the plaintiff and the said *William Stennett* did, and each of them did, in consideration of 13,000*l.*, direct, limit and appoint, that from and immediately after the execution thereof, the undivided moiety of each of them in the above-mentioned messuages and premises should remain and be to the use of *Wynn Ellis*, Esq., his heirs and assigns for ever (c),

(c) The following are the most material parts of this deed, which are not set out in the case. It will be seen that the Court was authorised to refer to the pleadings in the cause, and also to copies of the deeds.

"To have and to hold the said wharf or quay, hereditaments, and all and singular other the premises hereby released or intended so to be, with their appurtenances, unto and to the use of the said *Wynn Ellis*, his heirs and assigns, for ever; subject nevertheless to the proviso or condition for redemption thereof next hereinafter contained, that is to say, provided always, and it is hereby agreed and declared between and by the parties to these presents, that if the said *Thomas Wilkinson* and *William Stennett*, or either of them, or either of their heirs executors administrators or assigns, shall and do on the 5th day of *June* now next ensuing, well and truly pay, or cause to be paid, to the said *Wynn Ellis*, his executors administrators or assigns, the sum of 13,000*l.* of lawful money of *Great Britain*, together with interest for the same, after the rate of 5*l.* for every 100*l.* by the year, to be computed from the day of the date of these presents, without making any deduction or abatement out of the said sum of 13,000*l.* or the interest thereof or any part thereof respectively for or in respect of any present or future taxes, charges, assessments, payments or impositions, or any other matter cause or thing whatsoever, then and in such case he the said *Wynn Ellis*, his heirs or assigns, shall and will at any time after such payment shall be so made as aforesaid upon the request and at the proper costs and charges of the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs executors administrators or assigns, reconvey the said wharf or quay and hereditaments hereby appointed and released, or intended so to be, with their appurtenances, to the use of the said *Thomas Wilkinson* and *William Stennett*, their heirs and assigns, as tenants in common, or in such manner as they respectively shall in that behalf order or direct, free from all incumbrances whatsoever made done or committed by the said *Wynn Ellis*, his heirs executors administrators or assigns. And the said *Thomas Wilkinson* and *William Stennett* for themselves jointly and severally and for their respective heirs executors and administrators, do hereby covenant promise and agree with and to the said *Wynn Ellis*, his executors administrators and assigns, that they the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs executors administrators or assigns, shall and will well and truly pay,

or cause to be paid, unto the said *Wynn Ellis*, his executors administrators or assigns, the said sum of 13,000*l.* and the interest thereof, on or at the day or time mentioned in the aforesaid proviso for the payment thereof respectively, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents: Provided always, and it is hereby agreed and declared between and by the parties to these presents, that if the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs executors administrators or assigns, do and shall on the said 5th day of *June* now next ensuing, and on every 5th day of *June* and 5th day of *December* which will be in the years 1834, 1835, 1836, 1837, 1838, and 1839 respectively, and on the 5th day of *June* which will be in the year 1840, or within one calendar month next after each of the said days respectively, well and truly pay, or cause to be paid, unto the said *Wynn Ellis*, his executors administrators or assigns, half a year's interest for the said sum of 13,000*l.* after the rate aforesaid and without any deduction whatsoever, then and in such case it shall not be lawful for the said *Wynn Ellis*, his executors administrators or assigns, before the 5th day of *December*, 1840, to call in or compel payment of the said sum of 13,000*l.*, or of any part thereof; any thing in these presents contained to the contrary thereof in anywise notwithstanding: Provided always, and it is hereby further agreed and declared, between and by the parties to these presents, that if at any time or times, whilst the said sum of 13,000*l.* hereby secured as aforesaid, or any part thereof, shall remain due to the said *Wynn Ellis*, his executors administrators or assigns, half a year's interest shall be in arrear and unpaid for more than one calendar month after the time hereinbefore appointed for the payment thereof, and the interest being so in arrear, the said *Wynn Ellis*, his executors administrators or assigns, shall nevertheless neglect or forbear to call in or compel payment of the said sum of 13,000*l.*, or so much thereof as shall then be due, or shall accept interest for the same, or any part thereof, then and in such case the said *Wynn Ellis*, his executors administrators or assigns, shall not by such neglect or forbearance, or by such his or their acceptance of interest as aforesaid, be precluded or prevented from demanding recovering and receiving of and from the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs executors administrators or assigns, the payment of the said sum of 13,000*l.*, or so much thereof as

subject to a proviso for redemption thereafter contained, for payment of the sum of 13,000*l.*, with interest, on the 5th day of *June* then next. It was by the same indenture further provided, declared, and agreed, that the said *Wynn Ellis* should not be entitled to call in the principal money by him advanced upon the said mortgage, before the 5th day of *December*, 1840, if the interest payable by the mortgagors in respect of such principal money was in the mean time regularly paid, according to the terms of the said deed. In the said last-mentioned deeds are also the following clauses or provisions: And that if the said sum of 13,000*l.* or the interest thereof, or any part thereof respectively, should not be paid conformably to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of that indenture, then and in such case it should and might be lawful for the said *Wynn Ellis*, his heirs, and assigns, at any time or times thereafter, into and upon the said wharf or quay, and hereditaments, thereby appointed and released, or intended so to be, to enter, and the same from time to time peaceably and quietly to have, hold, occupy, possess, and enjoy, and receive and take the rents, issues, and profits thereof, without any let, suit, trouble, denial, interruption, or disturbance whatsoever, of, from, or by the said *Thomas Wilkinson* and *William Stennett* respectively, or their respective heirs or assigns, or any person or persons whomsoever, having or lawfully or equitably claiming, or who should or might have or lawfully or equitably claim, any estate, right, title, interest, or inheritance, in, to, or out of the said wharf or quay and hereditaments, thereby appointed and released, or intended so to be, or any part or parts thereof; and that free and clear, and freely and clearly and absolutely acquitted, exonerated, and for ever discharged or otherwise, by the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs, executors, or administrators, saved, protected, kept harmless, and indemnified of, from, and against, all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, trusts, wills, entails, annuities, fines, issues, amerciements, statutes, recognisances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, troubles, charges, debts, and incumbrances whatsoever: Provided always, and it was thereby further agreed and declared between and by the parties to the said indenture, that it should and might be lawful for the said *Thomas Wilkinson* and *William Stennett* respectively, and their respective heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy the said wharf or quay and hereditaments, thereby appointed and released, or intended so to be, with the appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, for their respective own use, until default should be made, in payment of the said sum of 13,000*l.*, or the interest thereof, or any part thereof respectively, contrary to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of the said indenture, without any let, suit, trouble, interruption or disturbance whatsoever, of, from, or by the said *Wynn Ellis*, his heirs or assigns, or of, from, or by any other person or persons whomsoever.

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shall then be due and the interest thereof; nor shall the said *Wynn Ellis*, his executors administrators or assigns, by such neglect or forbearance, or by such acceptance of interest as aforesaid, be precluded or prevented

from immediately using any powers or remedies for recovering and compelling payment of the said sum of 13,000*l.*, or so much thereof as shall then remain due, and the interest thereof."

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lawfully or equitably claiming, or to claim, by, from, or under or in trust for him or them.

On the 7th December, 1833, a notice from the Lords of the Treasury and the Secretary of the Customs, and signed by them respectively, was served upon the defendants, of which the following is a copy :

Gentlemen,

We hereby give you notice, that we have sold and conveyed all that legal quay or wharf called or known by the name of *Botolph Wharf*, now in your occupation, at the rent of 375*l.* per quarter, to *Thomas Wilkinson* and *William Stennett* ; and we hereby direct you in future to pay your rent to those gentlemen, and to consider them in every respect as your landlords. Dated this 7th day of *December*, 1833.

Prior to the conveyance, mortgage, and notice above stated, and while the negotiations for such conveyance were proceeding, namely, on the 12th Sept., 1833, a notice was served upon the defendants, of which the following is a copy :

Gentlemen,

Take notice that you are hereby required to quit on the 15th day of *Dec.* next ensuing the date hereof, or such other day on which the next quarter of your tenancy may expire, be the same the 12th, 13th, or 14th of next *Dec.*, or any other day, the peaceable possession of all that legal quay or wharf, called *Botolph Wharf*, and now in your tenancy or occupation. Dated this 12th day of *September*, 1833.

*J. Ker*, Secretary to the Commissioners of his Majesty's Customs on their behalf, and on their authority, and with the consent of the persons to whom the wharf is agreed to be sold.

The said *J. Ker* was the Assistant Secretary to the Commissioners of his Majesty's Customs, and acted at the Board for and on behalf of the Secretary, during his absence. On the 13th day of *September*, 1833, an order was signed with the initials of *Mr. Edward Steward*, who was acting chairman of the Board of Customs at that time, which order was to the effect following :

The solicitor having laid before the Board the form of a notice to be given pursuant to the Treasury order of the 11th instant, to Messrs. *Hall*, to quit *Botolph Wharf*, in consequence of *Mr. Wilkinson* having agreed to purchase the same,—Resolved, that the form of notice is approved ; and the Assistant Secretary is hereby authorised to sign and give the above notice to quit to Messrs. *Hall*, of which the solicitor is to be apprised. The notice was signed by *Mr. Ker*, in pursuance of that order, *Mr. Scovell* the Secretary not being then present.

On the 16th day of *December*, 1833, the following demand of possession signed by the plaintiff, the said *William Stennett*, and the said *Wynn Ellis* their mortgagee, was served upon the defendants :

To Messrs. *William Hall* and *Thomas Spencer Hall*, or whom else it may concern.

Take notice, that we the undersigned *Wynn Ellis*, *Thomas Wilkinson* and *William Stennett*, hereby demand of and require you to deliver up to a

subject to a proviso for redemption thereafter contained, for payment of the sum of 13,000*l.*, with interest, on the 5th day of *June* then next. It was by the same indenture further provided, declared, and agreed, that the said *Wynn Ellis* should not be entitled to call in the principal money by him advanced upon the said mortgage, before the 5th day of *December*, 1840, if the interest payable by the mortgagors in respect of such principal money was in the mean time regularly paid, according to the terms of the said deed. In the said last-mentioned deeds are also the following clauses or provisions: And that if the said sum of 13,000*l.* or the interest thereof, or any part thereof respectively, should not be paid conformably to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of that indenture, then and in such case it should and might be lawful for the said *Wynn Ellis*, his heirs, and assigns, at any time or times thereafter, into and upon the said wharf or quay, and hereditaments, thereby appointed and released, or intended so to be, to enter, and the same from time to time peaceably and quietly to have, hold, occupy, possess, and enjoy, and receive and take the rents, issues, and profits thereof, without any let, suit, trouble, denial, interruption, or disturbance whatsoever, of, from, or by the said *Thomas Wilkinson* and *William Stennett* respectively, or their respective heirs or assigns, or any person or persons whomsoever, having or lawfully or equitably claiming, or who should or might have or lawfully or equitably claim, any estate, right, title, interest, or inheritance, in, to, or out of the said wharf or quay and hereditaments, thereby appointed and released, or intended so to be, or any part or parts thereof; and that free and clear, and freely and clearly and absolutely acquitted, exonerated, and for ever discharged or otherwise, by the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs, executors, or administrators, saved, protected, kept harmless, and indemnified of, from, and against, all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, trusts, wills, entails, annuities, fines, issues, amerciaments, statutes, recognisances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, troubles, charges, debts, and incumbrances whatsoever: Provided always, and it was thereby further agreed and declared between and by the parties to the said indenture, that it should and might be lawful for the said *Thomas Wilkinson* and *William Stennett* respectively, and their respective heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy the said wharf or quay and hereditaments, thereby appointed and released, or intended so to be, with the appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, for their respective own use, until default should be made, in payment of the said sum of 13,000*l.*, or the interest thereof, or any part thereof respectively, contrary to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of the said indenture, without any let, suit, trouble, interruption or disturbance whatsoever, of, from, or by the said *Wynn Ellis*, his heirs or assigns, or of, from, or by any other person or persons whomsoever,

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shall then be due and the interest thereof; nor shall the said *Wynn Ellis*, his executors administrators or assigns, by such neglect or forbearance, or by such acceptance of interest as aforesaid, be precluded or prevented

from immediately using any powers or remedies for recovering and compelling payment of the said sum of 13,000*l.*, or so much thereof as shall then remain due, and the interest thereof."



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or be taken or considered, and that the same is not meant as a waiver or abandonment of the said notice so signed by the said *J. Ker*, and served upon you as aforesaid, in case that notice is legally sufficient to end and determine your tenancy of and in the aforesaid premises, on any of the days therein specified. And we the undersigned *Wynn Ellis, Thomas Wilkinson, and William Stennett*, do hereby reserve to ourselves and any or either of us, full power of adopting and acting upon the said notice so already served upon you as aforesaid, and of holding you liable for the double value of the said premises in case you shall hold over the same or any part thereof after any of the days mentioned in the notice so served upon you as aforesaid, provided your tenancy shall be thereby determined. Dated this 11th day of December, 1833.

(Signed)

The defendants did not quit or deliver up possession of the premises at the expiration of either of the notices to quit above set forth, and on the 1st *November*, 1834, an action of ejectment was commenced in the name of *John Doe*, on the three several demises of the plaintiff, *William Stennett*, and the said *Wynn Ellis*, for the purpose of recovering possession of the premises. That action was tried on the 23rd *December*, 1834, when the defendants by their counsel consented that a verdict should pass for the plaintiff in that action, subject to an order of the learned judge, that execution thereon should be stayed for five weeks from that day, and which order his Lordship was pleased to make: a verdict was taken for the plaintiff, and execution was stayed accordingly, and judgment in the said action of ejectment was not signed until the 18th *February*, 1835, and possession of the premises was obtained on the 6th *April*, 1835, under and by virtue of a writ of possession issued on the judgment. In the interval between the judgment and obtaining possession, application was made to the defendants to give up the possession. The premises being used for the purpose of landing goods, and there then being upon the premises many goods landed there upon which duties were due and payable to the Crown, and which goods could not legally be removed until the duties had been paid, and the goods in question belonging to many different individuals, the defendants did not give up an unincumbered possession of the premises; they however tendered possession thereof, with the before-mentioned goods thereon; which tender was objected to, and possession refused, on the ground that the same was not such a possession as the plaintiff in ejectment under his writ of possession was entitled to. The defendants have never paid any rent in respect of the said premises, either to the plaintiff or to his partner the said *William Stennett*.

Copies of the pleadings in this cause; of the indentures of lease and release of 2nd and 3rd *December*, 1833; of the indentures of lease appointment, and release of 4th and 5th *December*, 1833; and of the record of the judgment in ejectment of 18th *February*, 1835, in this case respectively mentioned, are annexed to, and are to be considered as parts of this case, and either party is to be at liberty to refer to them or either of them as such.

The defendants object that the plaintiff is not entitled to a verdict on any of the counts in the declaration. The objections to a verdict on either of the counts for double value are—

1st, That there was no proof whatever of any such tenancy as is stated in

the 1st or 2nd counts of the declaration, which tenancy the defendants having put in issue by their pleas, the plaintiff was bound to establish.

2ndly, That there was no evidence to prove, but on the contrary that the evidence, and particularly the deeds of the 2nd and 3rd of *December*, 1833, and of the 4th and 5th of *December*, 1833, disproved that the plaintiff was seised of the reversion at the times and in manner and form as in the 1st and 2nd counts alleged, which allegation the defendants having traversed, the plaintiff was bound to sustain.

3rdly, That the tenancy created by the agreement of the 12th of *June*, 1833, was not a tenancy for any term of life, lives, or years within the meaning of 4 Geo. 2, c. 28, so as to subject the defendants to an action for double value, if in other respects the requisites of that statute had been complied with.

4thly, That the tenancy created by the agreement of the 12th *June*, 1832, was not so put an end to as to entitle the plaintiff to sue for double value, either by notice to quit of the 12th *September*, or by that of the 12th *December*, 1833. That as respects the notice of the 12th *September*, there was no proof of any sufficient authority given to the party who signed the same, and because the notice if given by the authority of the persons then entitled to the reversion would not entitle a party to whom the reversion was conveyed after the giving the notice, and whilst it was running, to take advantage thereof, in order to sue for double value; and with respect to both notices, that if either of them determined the tenancy, still the reversion, at the time the tenancy was so determined, was not in the plaintiff, but in *Wynn Ellis*, who, if any one, ought to have sued. The defendants further object that if liable for double value at all, they were not liable for any time after the day of the demise, in the before-mentioned declaration of ejectment.

As to the count for use and occupation, the defendants object that the plaintiff could not recover, inasmuch as before the 15th day of *December*, 1833, the reversion of the premises had been conveyed to *Wynn Ellis*, and that the defendants were liable to him and not to the plaintiff. The questions for the opinion of the Court are, whether the four objections of the defendants to the claim for double value, and the objection to the claim for use and occupation above particularly stated, or any of them, are well founded?

Sir *F. Pollock* for the plaintiff.—The effect of the agreement made between the Lords of the Treasury and the defendants, was to create a tenancy in the premises from year to year, with a rent payable quarterly. But if that be not so, it must be held that it was a quarterly tenancy; and in either case the plaintiff is entitled to recover under the two first counts of the declaration. The statute 4 Geo. 2, c. 28, sec. 1, is applicable to the cases of “tenants for any term of life, lives, or years.” Now in *Legg v. Strudwick* (e), it was held, that a parol demise to hold from year to year and *sic ultra quamdiu*, is a lease for two years; and *Timmins v. Rowlinson* (f) decided that a tenant from year to year, who had held over after giving a notice to quit, was liable to pay double rent under stat. 11 Geo. 2, c. 19, sec. 18. *Lit. sec. 67. Co. Lit. 54 b.* It is true that in *Lloyd v. Rosebee* (g), Lord *Ellenborough* seems to have been of opinion, that the stat. 4 Geo. 2, c. 28, does not apply to a weekly

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(e) 2 Salk. 414.

(f) 3 Burr. 1603.

(g) 2 Camp. 452.

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tenancy, but that case never came before the Court in *Banco*, and needs confirmation. In *Wilkinson v. Colley* (h), the statute was held to be a remedial law, and was liberally construed. Then it is objected that the plaintiff had no reversion in the premises sufficient to satisfy the allegation in the declaration. It is well established that a tenant cannot set up the title of the mortgagee against the mortgagor, *Doe, d. Bristow, v. Pegge* (i); nor can a defendant who has come in under the plaintiff shew that his landlord's title is expired, *Balls v. Westwood* (k). In *The King v. St. Michaels* (l), Lord Mansfield said, that it was an affront to common sense to say the mortgagor is not the real owner of an estate; and that decision was recognised in *The King v. the Inhabitants of Edington* (m). But the deed of the 4th and 5th of December, 1833, contained a proviso, that the mortgagee should not be entitled to call in the principal money before the 5th December, 1840, if the interest was in the mean time regularly paid. Now this gave to the plaintiff a legal interest in the premises and the rents thereof, and must be construed as a lease for seven years. It must be taken that the interest has been regularly paid, and the mortgagee is therefore prevented, by this proviso, from maintaining an action of ejectment to recover the premises; nor could he recover the rents or profits. In *Evans v. Thomas* (n), it was said, that it had been adjudged that if one covenants and grants with another, that he shall have and hold his lands for so many years, it is a good and absolute lease. In the present case there is a covenant from the mortgagee that the mortgagor shall "have, hold, occupy, possess, and enjoy" the premises, until default should be made in payment of the principal money, "contrary to the aforesaid provisoes or agreements for the payment of the same." This would therefore enure as a lease, or an interest in the land equivalent to a lease, so as to entitle the mortgagors to bring ejectments in their own name. *Powsely v. Blackman* (o), *Richards v. Sely* (p), *Jemmot v. Cooley* (q).

As to the fifth objection it was held in *Soulsby v. Neving* (r), that after a landlord has recovered in ejectment against his tenant, he may maintain debt upon the statute for double the yearly value of the premises, during the time the tenant held over, after the expiration of the landlord's notice to quit.

*Bompas*, Serjt., *contra*. (*Wilde*, Serjt. and *Channell* were with him.) The plaintiff is not entitled to recover upon either of the two first counts in the declaration. If reliance was placed upon the authority of the 67 sec. of *Littleton*, where it is said that "if tenements be let to a man for a term of half a year, or for a quarter of a year, &c. In this case, if the lessee commit waste the lessor shall have a writ of waste against him, and the writ shall say *quod tenet ad terminum annorum*," then this declaration is defective, because it is added "but he shall have an especial declaration upon the truth of his matter." Here the declaration does not disclose the true tenancy, which was a quarterly one, but the first count states that the defendants held "for a term of years, from year to year," and the second describes it as "a tenancy for a term of years." This was a quarterly tenancy, determinable on three

(h) 5 Burr. 2694.  
 (i) 1 T. Rep. 758.  
 (k) 2 Camp. 11.  
 (l) 2 Doug. 630.  
 (m) 1 East, 288.

(n) Cro. Jac. 172.  
 (o) Cro. Jac. 659.  
 (p) 2 Mod. 80.  
 (q) 1 Levins, 170.  
 (r) 9 East, 310.

months' notice, similar to that in *Kemp v. Derrett* (s). If that be so, then the stat. 4 Geo. 2, c. 28, does not apply to this case; and *Lloyd v. Rosbee* (t) is an express authority upon that point. Lord *Ellenborough* there says, "This is a penal statute, and is to be construed strictly. A tenant from week to week I therefore cannot include in the description of 'tenant for life, lives, or years.' And I do not remember any instance of a tenant for a less time than a year being held within this Act of Parliament." The construction which has been put upon the mortgage deed cannot be supported. The only covenant for the redemption of the premises is that which is contained in the first proviso to pay the principal money in *June*, 1834, and then follows a covenant from the mortgagors to pay on that day. The second proviso will not operate at all in a Court of Law, although it may perhaps be noticed in equity. Upon the default to pay on the 5th *Jan.*, 1834, the estate of the mortgagee became absolute in law, and after default a mortgagor becomes a mere tenant at will, or sufferance, to the mortgagee, *Powseley v. Blackman* (u), *Smartle v. Williams* (v), *Moss v. Gallimore* (w); and the possession of the mortgagor is the possession of the mortgagee, *Birch v. Wright* (x), *Pope v. Biggs* (y). *Evans v. Thomas* (z), which has been relied upon, is rather an authority for the defendants, because it was held that a covenant to levy a fine, upon condition that if A. should pay 100*l.* within thirteen years to B. it should be to the use of B., did not amount to a lease. In *Drake v. Munday* (a), where it was decided that a grant amounted to a lease, an annual rent was reserved. Lastly, it is quite clear that this action must be brought by the party who has the legal estate vested in him, *Balls v. Westwood* (b), *Morgell v. Paul* (c), *Lumley v. Hodgson* (d).

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*Pollock* in reply.—The agreement in this case shewed that a yearly tenancy was intended. If this had been the letting of a farm, then a yearly tenancy would have been presumed for the sake of protecting the tenant; but the same inconvenience may arise in the case of a wharf, because the traffic which is carried on is much greater at some periods of the year than at others. The objection, that the declaration ought to have been special, cannot be raised now, because it was not taken at the trial. Then according to the doctrine laid down in *Co. Lit.* 54 b, the holding for a quarter is evidence of a holding for years.

**TINDAL, C. J.**—This is an action of debt, and in the two first counts of the declaration the plaintiff seeks to recover double the value of certain premises; and the third count claims single rent, for six months, from the 13th day of *December*, 1833, to the 13th day of *June*, 1834. In the first count, for double value, the plaintiff alleges that the defendants held the premises for a term of years, that is to say, from year to year, for so long a time as the said plaintiff and the defendants should respectively please, and that by a notice to quit, this tenancy was determined on the 14th of *June*, 1834; and in the

(s) 3 Camp. 509.

(t) 2 Camp. 452.

(u) Cro. James, 659.

(v) 1 Salk. 245; 3 Lev. 387, S. C.

(w) Doug. 279.

(x) 1 T. Rep. 333.

(y) 9 B. & Cress. 251.

(z) Cro. Jac. 172.

(a) Cro. Charles, 207.

(b) 2 Camp. 11.

(c) 2 Man. & Ry. 303.

(d) 16 East, 99.

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second count it is stated that the premises were held for the residue of a certain tenancy for a term of years which ended on the 14th day of December, 1833. There is a plea of *non tenuit* to both these counts, and the first question is, whether either of these allegations of tenancy are made out: and I am of opinion that they are not. Taking the statement of the commencement of the tenancy under the Lords Commissioners of the Treasury, as it appears in the agreement, or in the recital in the bond, the construction appears to me to be that the premises were taken at a certain sum per quarter, and that a quarterly tenancy only was created. Look at the allegation contained in the bond. It recites that the defendants had become tenants to the Commissioners of Customs of *Botolph Wharf*, at the rent of 375*l.* a quarter: if it had rested there, the nature of the holding would be a matter of some doubt and uncertainty, but it goes on to state that the defendants had that day paid the sum of 375*l.* for the first quarter's rent, and had agreed to pay the said sum of 375*l.* on or before the first day of every quarter during which they held the premises: these words seem to carry the intention of the parties no further than a quarter of a year. If we look again at the situation of the parties, it is not improbable that the Commissioners of the Treasury should make such an agreement. Nothing could be more probable than that they would sell these premises, and how much more likely were they to do so, if they demised them only for a quarter of a year? But if the matter remained *in dubio*, the parties have themselves put this construction upon the agreement, for the Lords of the Treasury gave the defendants a notice to quit at the end of the next quarter of the tenancy. Therefore I think that the plaintiff is not entitled to recover upon the two first counts.

This makes it unnecessary to give our decision upon other points in the case. We need not say whether the statute 4 Geo. 2 does or does not apply to quarterly holdings: we neither affirm it nor deny it. I now come to the last count, for use and occupation. I agree that inasmuch as the defendants have never paid rent to the plaintiff, whilst he had the legal estate, they are not estopped from shewing in this action that the plaintiff had not the legal reversion in the premises. It appears that *Wilkinson* and *Stennett* purchased the premises on the 3rd of December, 1833, and on the 5th of December following, they conveyed the premises to *Wynn Ellis* by way of mortgage. The plaintiff had the legal estate vested in him between the 3rd and 5th of December, but there was no act of recognition on the part of the tenants. Now the question arises on the effect of this conveyance, and there can be no doubt but that it operated so as to vest the legal inheritance and fee-simple in the mortgagee, from the very day on which it was executed. But the question is, whether the proviso does not operate so as to create a lease of the premises from the mortgagor to the mortgagees, for seven years, and I am of opinion that it does so operate. After the first proviso for the redemption of the premises, there follows a covenant from the mortgagees that it should not be lawful to call in the principal money until the 5th day of December, 1840; and then there follows a proviso that it should be lawful for the mortgagors peaceably and quietly to occupy and enjoy the premises, and to take the rents and profits thereof for their own use, until default should be made in payment of the principal money or the interest thereof, contrary to the provisos and the true intent and meaning of the indenture.

It is contended that this has reference only to the stipulation that the

on the 13th day of *June* 1834, and claiming double value from that day to the 6th day of *April* 1835, when the defendants quitted possession. The second founded on a three months' notice to quit, which expired on the 13th day of *December* 1833, and claiming double value from that day to the before-mentioned 6th day of *April* 1835. The declaration also contained a count for use and occupation, claiming the single rent for six months from the before-mentioned 13th day of *December* 1833, to the before-mentioned 13th day of *June* 1834.

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deliver up the possession of the said tenements, with the appurtenances, to them the said plaintiff and the said *William Stennett* or to either of them; that is to say, possession of the said first mentioned undivided moiety to him the plaintiff or the said *William Stennett*, and the possession of the said other undivided moiety thereof to the said *William Stennett* or the plaintiff, on the said 14th day of *June* 1834, provided the said defendants' tenancy of the said premises originally commenced at that period of the year, or otherwise to quit and deliver up the possession of the said premises, that is to say, of the said first mentioned undivided moiety thereof, to the said plaintiff or the said *William Stennett*, and the possession of the said other undivided moiety thereof, to the said *William Stennett* or the plaintiff, at the end of the current year of their tenancies, which should expire next after the end of half a year from the time of their being served with the said notice. And the said plaintiff avers, that the said term and tenancy of the said first mentioned undivided moiety of and in the tenements with the appurtenances, the reversion of and in which so belonged to him the plaintiff as aforesaid, and the said term and tenancy of and in the said other undivided moiety of the said tenements with the appurtenances, the reversion of and in which so belonged to the said *William Stennett* as aforesaid afterward, to wit, on the 14th day of *June* 1834, ended and were and each of them was duly determined by the said notice. And the said plaintiff in fact further says, that after the determination of the said tenancy of the said defendants of and in the said first mentioned undivided moiety of the said tenements with the appurtenances, the reversion of and in which so belonged to the plaintiff as aforesaid, and after the determination of the said tenancy of the said defendants of and in the said other undivided moiety of the said tenements with the appurtenances, the reversion of and in which so belonged to the said *William Stennett* as aforesaid, and whilst the defendants continued in possession of the entirety of the said tenements, with the appurtenances as aforesaid, and the said plaintiff was so entitled to the possession of the said first mentioned undivided moiety thereof; and whilst the said *William Stennett* was so entitled to the possession of the said other undivided moiety thereof as aforesaid, to wit, on the said 14th day of *June* 1834, the said plaintiff and the

said *William Stennett* by a certain notice in writing then made and signed by him the plaintiff and the said *William Stennett* and delivered to the said defendants, demanded and required the said defendants to deliver the possession of the said tenements with the appurtenances to the said plaintiff and the said *William Stennett*, that is to say, the plaintiff thereby demanded and required the defendants to quit and deliver up the possession of the first mentioned undivided moiety of the said tenements with the appurtenances, to him the said plaintiff or to the said *William Stennett*, and the said *William Stennett* thereby required the defendants to quit and deliver up the possession of the said other undivided moiety of the said tenements with the appurtenances to him the said *William Stennett* or the plaintiff.

Averment.—That the defendants did not deliver up the possession of the premises according to the said notice and demand, but wilfully held over the same—concluding with an averment of the value of the premises, &c.

Second Count.—And whereas also, the said defendants heretofore and before the giving of the notice and making the demand in writing as in this count mentioned, to wit, on the 3rd day of *December* 1833, and from thence until a certain day, to wit, the 14th day of *December* in the same year, held and enjoyed one undivided moiety of certain tenements with the appurtenances, situate in the city of *London*, as tenants thereof to the said plaintiffs; that is to say, as tenants thereof for the residue and remainder of a certain tenancy for a term of years to them the said defendants heretofore, to wit, on the 12th day of *June* 1832, granted, the reversion of the one undivided moiety in this count first mentioned of the said tenements with the appurtenances in this count mentioned, during all that time belonging to the said plaintiff, and the defendants during all the time aforesaid held and enjoyed the other undivided moiety of the tenements in this count mentioned with the appurtenances, as tenants thereof to the said *William Stennett* for the residue and remainder of the said term, the reversion of and in the last mentioned moiety of the said tenements, with the appurtenances, during all that time belonging to the said *William Stennett*, and the said respective tenancies and terms afterwards, to wit, on the 14th day of *December* 1833, were and each of them was

Nov. 12.

## JAMES v. SALTER and another (a).

The limitation affecting a right to recover a rent charge granted by will, is twenty years from the death of the testator, under 3 & 4 Wm. 4. c. 27, sec. 2.

**REPLEVIN.**—The declaration alleged that the defendants took and detained certain chattels in a dwelling-house and lands in the parish of *Uffculme, Devon*. The defendants avowed and made cognizance that the said dwelling-house, land, and premises in which, &c., heretofore to wit, on the 10th November, 1804, were the freehold premises of one *James Salter*, since deceased, late father of the defendant *Salter*, and continued so until and at the time of the decease of the said *J. Salter*; and that the taking of the said goods and chattels, as in the declaration mentioned, was done under and in pursuance of a certain power contained in the last will and testament of the said *J. Salter* deceased, bearing date the 3rd of August, 1800, for raising and paying a certain annuity, yearly rent, or sum of 30*l.*, given and bequeathed in and by the said will to the said defendant *Salter*, and charged and chargeable on the said freehold premises of the said *J. Salter*, deceased; and because the sum of 370*l.*, part of the said annuity, yearly rent, or sum of 30*l.* accruing due at *Christmas-day* last, was behind and unpaid for the space of twenty days after the said *Christmas-day*, the same having been lawfully demanded and not paid, the defendant, *Salter*, in his own right avowed, and the other defendant as bailiff to the defendant *Salter*, acknowledged, the taking the said goods and chattels in the declaration mentioned, to satisfy the said arrears according to the purport, tenor, and effect of the said will, concluding with a verification.—*Pleas in Bar.*—Secondly, that the said distress in the avowry and cognizance mentioned was not made at any time within twenty years next after the time at which the right to make a distress for the arrears of the said annuity, yearly rent, or sum of 30*l.* first accrued to the defendant *J. Salter*: concluding with a verification. Thirdly, that the said distress was not made within six years after the said arrears, in respect of the said annuity, yearly rent, or sum of 30*l.* first became due—concluding with a verification.

Replication to the second plea,—That so far as the same related to 553*l.* part of the money in the avowry and cognizance mentioned, the distress was made within twenty years next after the time at which the right to make a distress for the said sum of 553*l.*, and every part thereof, being the arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant *Salter*; and as to the residue of the second plea in bar, so far as the same related to the residue of the money in the avowry and cognizance mentioned, the defendants relinquished their avowry and cognizance and prayer of judgment, so far as the same related thereto.

To the third plea.—That the distress was made within six years next after the arrears in respect of the annuity, yearly rent, or sum of 30*l.* first became due. Issue was joined on both pleas. At the trial at the last *Devon Assizes*, the jury found a special verdict, which set out the will of *James Salter*, the father of the defendant *Salter*, by which it appeared that he had charged his freehold property with the annuity set forth in the avowry; that the said

subject to a proviso for redemption thereafter contained, for payment of the sum of 13,000*l.*, with interest, on the 5th day of *June* then next. It was by the same indenture further provided, declared, and agreed, that the said *Wynn Ellis* should not be entitled to call in the principal money by him advanced upon the said mortgage, before the 5th day of *December*, 1840, if the interest payable by the mortgagors in respect of such principal money was in the mean time regularly paid, according to the terms of the said deed. In the said last-mentioned deeds are also the following clauses or provisions: And that if the said sum of 13,000*l.* or the interest thereof, or any part thereof respectively, should not be paid conformably to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of that indenture, then and in such case it should and might be lawful for the said *Wynn Ellis*, his heirs, and assigns, at any time or times thereafter, into and upon the said wharf or quay, and hereditaments, thereby appointed and released, or intended so to be, to enter, and the same from time to time peaceably and quietly to have, hold, occupy, possess, and enjoy, and receive and take the rents, issues, and profits thereof, without any let, suit, trouble, denial, interruption, or disturbance whatsoever, of, from, or by the said *Thomas Wilkinson* and *William Stennett* respectively, or their respective heirs or assigns, or any person or persons whomsoever, having or lawfully or equitably claiming, or who should or might have or lawfully or equitably claim, any estate, right, title, interest, or inheritance, in, to, or out of the said wharf or quay and hereditaments, thereby appointed and released, or intended so to be, or any part or parts thereof; and that free and clear, and freely and clearly and absolutely acquitted, exonerated, and for ever discharged or otherwise, by the said *Thomas Wilkinson* and *William Stennett*, or one of them, their or one of their heirs, executors, or administrators, saved, protected, kept harmless, and indemnified of, from, and against, all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, trusts, wills, entails, annuities, fines, issues, amerciaments, statutes, recognisances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, troubles, charges, debts, and incumbrances whatsoever: Provided always, and it was thereby further agreed and declared between and by the parties to the said indenture, that it should and might be lawful for the said *Thomas Wilkinson* and *William Stennett* respectively, and their respective heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy the said wharf or quay and hereditaments, thereby appointed and released, or intended so to be, with the appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, for their respective own use, until default should be made, in payment of the said sum of 13,000*l.*, or the interest thereof, or any part thereof respectively, contrary to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of the said indenture, without any let, suit, trouble, interruption or disturbance whatsoever, of, from, or by the said *Wynn Ellis*, his heirs or assigns, or of, from, or by any other person or persons whomsoever,

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shall then be due and the interest thereof; nor shall the said *Wynn Ellis*, his executors administrators or assigns, by such neglect or forbearance, or by such acceptance of interest as aforesaid, be precluded or prevented

from immediately using any powers or remedies for recovering and compelling payment of the said sum of 13,000*l.*, or so much thereof as shall then remain due, and the interest thereof."



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*Butt, contra.*—The second section must be taken in connexion with the third, and by the words “other than a will,” the case of an annuity secured by a will is expressly exempted. The exemption was probably introduced to prevent the injustice which would result where a will was kept out of sight or lost, for many years. The form of the issue which is raised prevents the fortieth section from being prayed in aid, but if it could be, it would afford no answer, because it is only applicable to the case of conventional rents by parol, *Paget v. Foley (b)*. As to the last issue the plea is not pleaded as a bar to the title to the annuity itself, but it merely alleges that the distress was not made within six years after the said arrears in respect of the annuity became due; now it is clear that the distress was made within that time.

*Crowder* was heard in reply.

*Cur. adv. vult.*

TINDAL, C. J.—The question which has been argued before us arises upon a special verdict found on the second and last issues raised between the parties to this action; the second issue being upon the question “whether the distress, so far as relates to 585*l.*, part of the money in the avowry and cognisance mentioned, was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof being arrears of the said annuity, yearly rent, or sum of 30*l.* first accrued to the defendant *John Salter*, and the last issue being upon the question whether the distress in the avowry and cognisance mentioned was made at any time within six years next after the arrears in respect of the said annuity, yearly rent, or sum of 30*l.* first became due. Of these two issues the first appears to us to be the principal, and indeed the only important one; for if the plaintiff is entitled to judgment in his favour on that issue, the right and title of the defendant *Salter* to the annuity is altogether barred, and he cannot in any view of the case be allowed to recover the arrears for the last six years, to which only the pleadings on which the last issue is raised can be held to apply. The facts which are found by the special verdict on the two issues are few, and simple. That *James Salter*, the father of the defendant of that name, by his will, duly made and published, devised the property therein mentioned to trustees, to the intent that they should, out of the rents and profits, pay to *John Salter*, the defendant, during the term of his natural life, an annuity or clear yearly rent of 30*l.* by four quarterly payments, to commence on the first quarterly day of payment after his decease, with a power of distress if the annuity should be in arrear for twenty days next after any quarterly day of payment. That the testator died in 1804, without having revoked or altered his will, and that on the 17th *March*, 1835, the defendants distrained for 870*l.*, for twenty-nine years’ arrears of the annuity ending at *Christmas*, 1834. Upon this state of facts it appears that the right to make a distress for the annuity first accrued to *John Salter*, the son, on the expiration of the twenty days next after the first quarterly day of payment subsequent to the testator’s death, that is, at the very latest, some time in *April*, 1805. It also appears, that so far as there is any allegation on

(b) 2 *Hodges*, 32; 2 *Bing. N. C.* 679.

the record, on any finding by the jury, there was no payment or receipt of the annuity by the defendant *Salter*, before the distress was put in in *March*, 1835, for it was then put in by the defendant for the whole of the arrears since the death of the testator. And although the defendant has, by his own voluntary act, in his replication to the plea in bar, abridged the amount of the arrears for which he had distrained and avowed, that is, from twenty-nine years to nineteen years and a half, still this act of the defendant has no bearing on the fact appearing from the record that no distress was made for twenty-nine years after the right to distrain first accrued. Now upon reference to the statute 3 and 4 W. 4, c. 27, it appears to have provided two distinct periods of limitation, within which all distresses for arrears of annuities must be made; the two periods being prescribed in respect of claims and objects in their own nature perfectly distinct. The second section contemplates and provides for the case where the right or title to the annuity itself is disputed, and directs that no person shall make a distress for any rent but within twenty years next after the time at which the right to make such distress shall have first accrued to the person making the same. The forty-second section contemplates and provides for the case where the title to the annuity is not disputed, but the distress is made for arrears due; and for that purpose directs that no arrears of rent shall be recovered by any distress but within six years next after the same respectively shall have become due. The second issue arises upon a plea in bar framed upon the second section. The last issue arises upon a plea in bar intended to be framed, though not accurately or aptly framed, on the forty-second section. Now with respect to the second issue, it is manifest that the facts found in the special verdict will bring the case precisely within the provision of the second section of the act, unless that section is to be governed and controlled, not simply explained and construed, by the third; that is, unless the third section does in terms exclude from the operation of the second the claim of any person whose right to a rent is derived under a will by reason of the words "other than by will," which are found in the third section; and when this case was originally before the Court upon a motion for a new trial, after the rule had been made absolute upon a ground perfectly distinct from that which is now before us, an opinion was expressed by the judges then in Court that the present case was excluded from the operation of the second section, by reason of its not being comprehended within the third, which third section appeared to us upon a more hasty view to contain an enumeration of instances to which only the second section could be held to be applicable (a). For myself, however, I am ready to admit, and I am authorised at the same time to say the same for my three brethren who were then in Court, that the further argument which we have heard on this point, when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed, and that we think (in which my brother *Vaughan* entirely concurs with us) that this case is governed by the second section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity. That the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon

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(a) See *James v. Salter*, 1 *Hodges*, 405.

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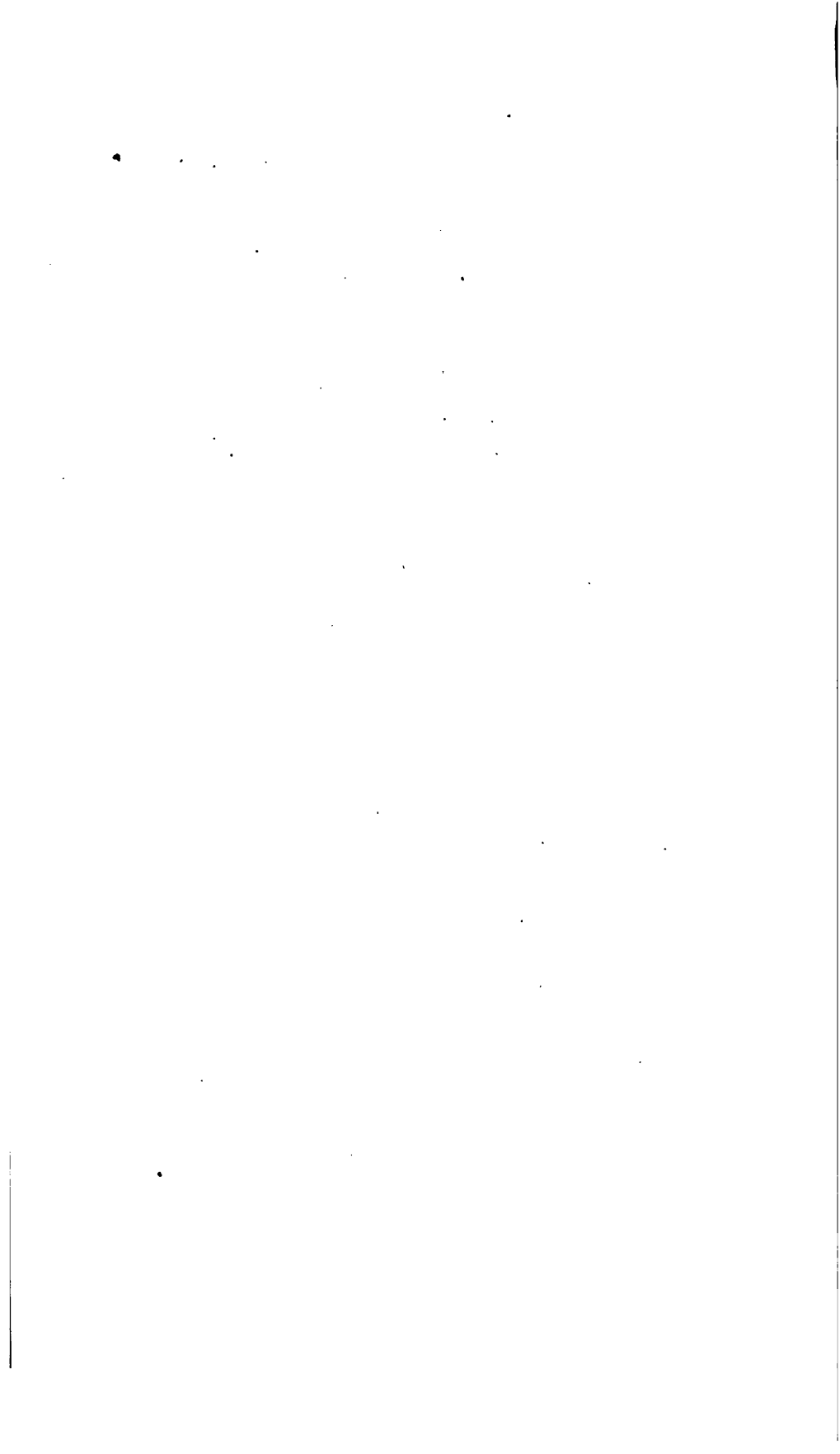
a more close examination of the third section, the object and intent of it seem to us to be no more than this, to explain and give a construction to the enactment contained in the second clause, as to the time at which the right to make a distress for any rent shall be deemed to have first accrued, in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second. Many reasons concur to shew that such must be the just construction of the act. In the first place, if it had been intended that the third section should limit the application of the second to those cases, and those only which are enumerated in the third, it might justly have been expected that words would have been employed to express clearly and distinctly such an intention. But in this section there are no words that can be said directly to exclude all instances except those enumerated in the third section. Again, if the words "granted by any instrument other than by will" were to be held to prevent the application of the statutory limitation of twenty years to claims of land or rent granted by will, it would be at direct variance with other parts of the statute; for the instance in the third section immediately following that now under consideration, which provides for cases of claims in respect of estates in reversion or remainder, or other future estates or interests, is large enough to comprehend, and would comprehend all executory devises. And again, section 40 expressly provides for the case of any legacy; and indeed the words "by any instrument other than by will," carry the matter no further than if the third section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been, that the case not being enumerated in the third section, fell back upon the general provision contained in the second. Indeed, unless this is held to be the true construction, the case which is likely to occur perhaps with the most frequency, viz., the devise of an estate in possession in land, or of an estate in possession in a rent charge first created by the will, would be altogether unprovided for by the statute; for the third class of instances enumerated in section 3 describes the grant to be by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, a description which can neither apply to the case of a devise of a particular estate in land, or of a newly created rent, for the deviser who has by his will carved an estate in land, out of the estate whereof he was seized, can never be said to have been possessed in respect of the same estate or interest as that claimed by the devisee, still less can the deviser who creates a new rent-charge by his will be said to have been in the receipt of the rent. The case therefore under discussion, not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby; that the claim and title of the defendant *Salter* to the annuity is barred by the lapse of twenty years, since his right to distrain first accrued, and that the verdict upon the second issue must be entered for the plaintiff. As to the last issue, founded upon the limitation of six years, given by the forty-second section, it becomes of little importance whether the verdict thereon be entered for the plaintiff or the defendant, any further than as the costs dependent on that issue are affected by

such finding. For there being but one avowry, and the plaintiff being entitled to judgment on the issue raised on one of his pleas in bar, the avowant's claim to a return of the cattle, &c. is completely barred, whatever may become of the other pleas in bar. Now taking the last issue as if it stood alone, which appears to be the correct mode of considering the question, and applying thereto the finding in the special verdict, we think it appears that the distress was made within six years next after the arrears of the annuity became due ; for upon the last issue there is no objection made to the avowant's right or title to the annuity itself, but simply to the amount of arrears claimed beyond those of the last six years, and the distress was evidently made within time for the last six years. We therefore think the verdict on the last issue must be entered for the defendant, but that upon the whole record the judgment must be for the plaintiff.

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Judgment for the plaintiff.

END OF HILARY TERM.



# CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Easter Term, 1837.

BOULTON v. WELCH.

April 27.

**A**SSUMPSIT on a promissory note, made on the 18th of *July*, by *H. T. Stanley*, whereby he promised to pay to his own order 200*l.* three months after the date thereof; and indorsed by *Stanley* to one *Braddon*, who indorsed it to the defendant, and afterwards indorsed to the plaintiff. The declaration averred that *Stanley* did not pay the bill, although the same was presented to him on the day when it became due, "of all which the defendant then had due notice."

*Plea*—that the defendant did not have notice of the said presentment to the said *H. T. Stanley*, and of the non-payment by him of the said note *modo et formd*; and issue thereon.

At the trial before *Park, J.*, the plaintiff proved that before ten o'clock on the 22d of *October*, he had put a letter into the post, directed to the defendant, of which the following is a copy :—

" 33, Northampton Square,

" 22d October, 1836.

" Sir,—The promissory note for 200*l.* drawn by *Henry Stanley*, dated 18th of *July* last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount forthwith.

(Signed,)

" *W. J. Boulton.*"

It was objected, on behalf of the defendant, that this letter did not contain sufficient notice of the presentment and dishonour of the note. The learned judge reserved the point, and a verdict was found for the plaintiff. A rule *nisi* was obtained for leave to enter a nonsuit upon the point reserved. *Hartley v. Case (a)*, and *Solarte v. Palmer (b)*, were cited.

In an action on a bill of exchange by indorsee against indorser, the defendant pleaded that he did not have notice of the presentment of the bill to the acceptor, and of the non-payment thereof; and issue thereon :—*Held*, that proof of the delivery of the following letter from the plaintiff to the defendant, was insufficient to sustain this issue. " The promissory note for 200*l.*, drawn by *H. S.*, dated the 18th of *July* last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount forthwith."

(a) 4 Barn. & Cress. 339. 6 D. & R. 505.

(b) 7 Bing. 530. 5 M. & P. 475. 1 Cr. & J. 417.

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*Talfourd*, Serjt., shewed cause.—In *Hartley v. Case* (c), there was only a request to pay, without any notice of dishonour; and in *Solarte v. Palmer* (d), the following letter, which was sent by the attorney of the holder, was clearly insufficient, because it contained a mere demand of payment.

“A bill for 683*l.*, drawn, &c., and bearing your indorsement, has been put into our hands by Mr. A., with directions to take legal measures for the recovery thereof, unless immediately paid.”

In the present case, the letter contained notice of the presentment and non-payment by the drawer; and therefore both the cases relied upon are clearly distinguishable, and the Court will not extend those decisions further. By necessary intendment, which must be apparent to every mercantile man, the letter contains sufficient notice. [*Tindal*, C. J.—We must be guided by the precedents. A merchant could certainly entertain no doubt. *Bosanquet*, J.—*Solarte v. Palmer* (d) was confirmed in the House of Lords; and I remember hearing Lord *Eldon* say, that a judgment in the House of Lords was deserving of respectful attention, although it was decided by a majority of one, against the opinions of all the judges.]

*Busby*, *contra*.—Upon the issue which is raised by these pleadings, and which is twofold, the letter is clearly insufficient. The plaintiff is bound to shew that the defendant had notice of the presentment, and also of the non-payment of the note. [*Tindal*, C. J.—I suppose the letter was sent to the special pleader, to enable him to frame this plea.] The letter does not contain any notice that the note was presented for payment; and the statement that it was returned to the plaintiff unpaid, is quite consistent with the fact of its being in the hands of a third party, who failed to present it in due time. The authorities are decisive to shew that the notice of dishonour should state the presentment and non-payment, as specific facts.

TINDAL, C. J.—I do not see how it is possible to distinguish this case from the two authorities which have been cited, without refining very subtly upon the rule which they have established. The form of protest which is given by stat. 9 & 10 W. 3, c. 17, is “Know all men, that I, A. B., on the day of                    at the usual place of abode of the said                    have demanded payment of the bill, of the which the above is the copy, which the said                    did not pay; wherefore I, the said                    do hereby protest the said bill, dated the                    day of                    .” The two important points contained in the notice, are, first, that the payment was demanded; and, secondly, that the payment was not made. It seems to me that in the present case the notice is insufficient, and this rule must be made absolute.

PARK, J.—I am satisfied that an ordinary person would be able to collect from this letter, that the note had been presented and was unpaid; but after the two decisions which have been referred to, I cannot hold that this notice is sufficient.

(c) 4 Barn. & Cress. 339. 6 D. & R. 505.

(d) 7 Bing. 530. 5 M. & P. 475. 1 Cr. & J. 417.

BOSANQUET, J.—I cannot distinguish this from the two cases which have been cited.

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COLTMAN, J.—I am of the same opinion, and must say that too great a looseness is apparent, in the mode in which mercantile transactions of this kind are conducted.

Rule absolute.

### TYLER v. CAMPBELL.

April 18.

**BARSTOW** moved for a rule to discharge the defendant out of custody, on entering a common appearance, upon the ground that the affidavit to hold to bail was defective. The affidavit stated that the defendant was justly and truly indebted to the plaintiff in 800*l.*, for so much money due from the defendant to the plaintiff, upon the balance of an account stated between the defendant and the plaintiff. This form differs from that which is given in *Tidd's Forms* (a), where the account is alleged, as being "stated and settled" by and between the parties. It may be perfectly consistent that the plaintiff should believe that the defendant is indebted to him on an account stated between them, when he would nevertheless be unable to state that the account was settled. In *Visger v. Delegal* (b), Lord Tenterden, C. J. said, "There are certain forms of affidavits to hold to bail in common use, and generally known and understood. The safest course is, that individuals should conform to these and not depart from them, and then call upon the Court for such a construction as may remedy the fault."

An affidavit to hold to bail for money due from the defendant on the balance of an account stated, is sufficient, without stating that the account was stated and settled.

TINDAL, C. J.—The forms of the common counts in pleading, which have been promulgated by the judges, state no more than that the sum claimed is due on an account stated. As this affidavit in substance follows the allegations in those forms, I think it is sufficient.

BOSANQUET, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule refused.

(a) *Tidd's Forms*, 9th ed. 78.

(b) 2 Bar. & Adol. 572.

### ERNEST v. BROWN.

April 18.

**DEBT** for goods sold and delivered. *Plea*—Except as to 3*l.* 7*s.*, *nunquam indebitatus*, and a payment of 3*l.* 7*s.* into Court. The bill of particulars delivered by the plaintiff was as follows:—

|                          |   |   |   |   |       |    |   |
|--------------------------|---|---|---|---|-------|----|---|
| For a cart sold          | - | - | - | £ | 5     | 0  | 0 |
| Deduct, paid by N. Brown | - | - | - |   | 1     | 13 | 0 |
|                          |   |   |   |   | <hr/> |    |   |
|                          |   |   |   |   | 3     | 7  | 0 |
|                          |   |   |   |   | <hr/> |    |   |

In debt, under a plea of *nunquam indebitatus*, payment must be pleaded, although the plaintiff has given credit for the sum paid, in the bill of particulars.



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v.  
BROWN.

At the trial, before *Tindal*, C. J., at the *London* sittings after *Hilary* Term, the defendant offered evidence of the payment of 1*l.* 13*s.* to the plaintiff; but the learned judge refused to receive it, as there was no plea of payment on the record, and a verdict was found for the plaintiff, with nominal damages.

*R. Alexander* moved to set aside the verdict, and to enter a verdict for the defendant. The bill of particulars admitted the receipt of 1*l.* 13*s.*, and therefore it must be considered as if it was struck out of the demand. In *Coates v. Stevens* (a), *Parke*, B. observed, "You have no necessity to plead the payment of the sum of 10*l.*, as that was admitted by the particulars."

TINDAL, C. J.—That was in an action of *assumpsit*, which is very different (b). Here you say that you never were indebted to the plaintiff. Strong as the admission is, it is no more than evidence of payment; but it cannot be set up in bar of this action (c).

BOSANQUET, J.—The plea of *numquam indebitatus* was framed, in order that payment might be pleaded. Here the debt was once due.

COLTMAN, J., concurred.

Rule refused.

(a) 2 Cr. M. & R. 118. 1 Gale, 75.

(b) *Shirley v. Jacobs*, 1 Hodges, 214.

(c) See *Brown v. Daubeney*, 1 Har. & Wol. 547. where *Patteson*, J. came to a similar decision.

April 27.

CHOLMONDELEY, Executrix of *HEBER*, v. *PAYNE* and another.

The first count of a declaration set out a contract that the defendants, together with the auctioneer employed, would be responsible for the proceeds of the sale of certain books: the second count, that the defendants alone would be responsible:—*Held*, that these counts did not shew a distinct subject-matter of complaint, within Reg. 5, Hil. T. 4 W. 4.

*F. ROBINSON* obtained a rule *nisi*, calling upon the plaintiff to shew cause why one of two special counts in the declaration in this case should not be struck out, under R. 5 & 6 Hil. T. 4 W. 4. The first count alleged that the defendants undertook to sell certain books, upon the terms of preparing catalogues, advertising the sales and settling with the auctioneers at a commission of twelve and a half per cent.; and that the defendant should be responsible, together with the auctioneers, for the proceeds of the sale, having power to give certain credit to the booksellers. The second count stated, that in consideration of the plaintiff retaining the defendants to sell upon commission, certain books, manuscripts, and prints, the defendants undertook to be responsible for the prices of the same; that the goods were sold, but that the defendants did not pay the money received by them.

An application had been previously made to a learned judge at chambers, who declined to make any order, but referred the matter to the Court.

*Butt* shewed cause upon an affidavit, which stated that the action was brought to recover two separate sums of 800*l.*, and that the plaintiff was advised that the two counts were necessary. The two counts disclose two different and distinct causes of action; and if it be doubtful whether the causes are distinct, the Court will not interfere. The new rule must be construed with reference to the Statute of Amendments, 3 & 4 W. 4, c. 42, s. 23.

and it is obvious that if the plaintiff failed at *Nisi Prius* in proving the first count, proof of the contract set out in the second count would not support the declaration; and the judge would not amend the record. [*Bosanquet, J.*→] The rule directs that if a judge at chambers shall be satisfied that some distinct subject-matter of complaint is *bond fide* intended to be established in respect of each count, he indorses upon the summons that he is so satisfied; and then if the plaintiff fails to establish a distinct matter upon each count, certain consequences follow. Are you willing to take both counts upon the usual terms?] The defendants are not in a situation to require this, because the counts are obviously distinct, and the judge at chambers has refused to interfere; and this Court has no jurisdiction to interfere, because the rules only direct application to be made to a single judge, [*Tindal, C. J.*—But here the judge refers the question to the Court.]

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*Robinson, contrà.*—The first contract must be in writing, and the defendants must plead several long special pleas, which will be unnecessary if the other count were pleaded alone. At the trial, the judge will exercise his power of amending the record, as in *Hanbury v. Ella* (a), where the record was amended by substituting the word "guarantee" for "pay." The present case comes precisely within the terms of the first example in the rules: "Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract." In *Jenkins v. Treloar* (b), a count for 4d. as toll for performing meterage, and a count claiming the same sum as a port duty, were held inadmissible.

TINDAL, C. J.—I cannot say that these counts disclose two distinct and different causes of action. The rule must be made absolute, subject to its being referred back to the learned judge: and if he is satisfied that a distinct matter of complaint is intended to be established, the usual indorsement may be made.

PARK, J.—I think we have no power to interfere; it must go back to the judge at chambers.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute to strike out the second count, with costs, unless the judge at chambers should exercise his discretion as directed by the rule (c).

- (a) 1 Ado. & Ellis, 61. 3 Nev. & Man. 438. 16; *Lawrence v. Stevens*, 1 Gale, 164;  
(b) 1 M. & Wels. 16. 1 Gale, 360. *Thoroton v. Hitchhead*, 1 Gale, 359; *Roy v. Bristow*, 1 Murphy and Hurlstone, 39.  
(c) See *Leuckart v. Cooper*, 1 Hodges,

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April 19.

## BRITTON v. JONES, Administratrix of JONES.

Upon an issue whether an administratrix, had assets at the commencement of the suit, the plaintiff proved that the intestate, twelve months before his death, had purchased certain furniture, which was seen after his decease, in a house where he lived with the defendant, his sister. The defendant proved, that he was merely a lodger in the house.—*Held*, that there was *prima facie* evidence of the possession of assets.

**THIS** was an action for money had and received by the intestate. *Plea*.—*Plene administravit*. *Replication*.—That the defendant had assets at the time of the commencement of the suit, and issue thereon.

At the trial before the under-sheriff of *Glamorganshire*, the plaintiff proved that the intestate, twelve months before his death, had purchased twelve mahogany chairs, which were seen after his decease in a house in which he lived, and where his name was on the door. The defendant, who was the intestate's sister, proved that he was in needy circumstances, and that he lived in the house as her lodger, with his mother. The under-sheriff held that there was evidence of the possession of assets, and a verdict for 4*l.* 4*s.* was found for the plaintiff.

*E. V. Williams*, moved to enter a nonsuit, upon the ground of misdirection. He contended that there was no evidence to go to the jury, unless it had been shewn that these goods came into the hands of the defendant.

**TINDAL, C. J.**—The only question is, whether the plaintiff did not make out a *prima facie* case, and I think he did. It appears that the defendant was the intestate's sister; that she lived in the same house with him, and took out the letters of administration. The evidence which was offered might have been rebutted.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule refused.

May 6.

## WILLIE v. PHILLIPS.

After a writ of summons was issued, but before it was served, the defendant paid the plaintiff the debt, but afterwards refused to pay the costs of the writ; whereupon the plaintiff's attorney delivered a declaration, and proceeded with the action. The court ordered the proceedings to be stayed on payment of the costs of the writ, but refused to make the defendant pay the costs of the declaration.

**KELLY** obtained a rule *nisi*, calling upon the defendant to shew cause why an order, made by Lord *Denman*, C. J., should not be set aside. On the 18th of *February* a writ of summons was issued against the defendant, and several ineffectual attempts were made to serve it. On the 25th of *February*, before the writ was served, the defendant paid the plaintiff's clerk the amount of the debt; but, upon application being made, he refused to pay the plaintiff's attorney the costs of the writ, whereupon, on the 3d of *March*, the writ having been previously served, and the defendant having refused to pay the costs of it, a declaration in the action was delivered. Upon application being made the proceedings were ordered to be stayed without costs, which was the order complained of.

**Wilde**, Serjt., shewed cause.—When the debt was paid, the writ had not been served, and the plaintiff had no right to proceed to recover his costs.

*Kelly, contrd.*—It appears by the affidavits that the defendant was informed by the plaintiff's clerk, when he paid the debt, that a writ had been issued, and that he would be required to pay the costs of it, which he promised to do; and that application was made for payment of the costs, several days before the declaration was delivered, but the defendant refused to pay; the rule ought therefore to be made absolute.

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TINDAL, C. J.—It appears to me that the order could not have been disturbed, if it had stayed proceedings on payment of the costs of the writ of summons. The writ was issued before the debt was paid, and therefore the costs of it ought to be paid by the defendant; but under the circumstances the plaintiff ought not to have gone on with the action. The order must be amended to stay the proceedings, on payment of the costs of the writ.

BOSANQUET, J. and COLTMAN, J., concurred.

Rule absolute accordingly.

### POLE v. ROGERS.

THIS was an action on a life policy of insurance, and a judge's order had been obtained by the defendant, under stat. 1 W. 4, c. 22, for the examination upon interrogatories of certain witnesses, residing in *Paris* and *Boulogne*. A rule was afterwards obtained by the plaintiff, to shew cause why the order should not be amended, by giving a power to the plaintiff, his attorney, or agent, to cross-examine the defendant's witnesses *vivd voce*.

May 8.

Under the Interrogatories' Act (1 Will. 4, c. 22), the court gave the parties a mutual power to cross-examine witnesses in *Paris* and *Boulogne*, *vivd voce*, and directed that the cross-examinations should be taken down in writing, and returned with the commission.

*R. V. Richards* shewed cause.—*Duckett v. Williams (a)*, is the only case where cross-examinations upon interrogatories have been allowed, and then it was done by the consent of both parties, who had a mutual right to cross-examine. Great inconvenience will arise if the present application is granted, because the defendant must incur the expense of sending out a counsel, or irregular questions will be put in the absence of a competent person. [Tindal, C. J.—It is a conflict between two inconveniences. The result will probably be, that a counsel on each side will attend.]

*Wilde, Serjt., contrd.*—It is very necessary, in a case of this description, to put questions which arise from the answers given to former questions: and by sec. 4 of the statute, the court has power "to give all such directions touching the time, place, and manner of such examination, and all other matters and circumstances connected with such examination, as may appear reasonable and just." Under the 13 Geo. 3, c. 63, which regulates the mode of taking examinations in *India*, *vivd voce* cross-examinations have been permitted. As to the alleged inconvenience, it will be remedied in the manner suggested by the lord chief justice; and *Duckett v. Williams (a)* is an authority for making this rule absolute.

(a) Reported on another point, 1 Tyr. 502. 1 Cr. & J. 510.

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TINDAL, C. J.—I think this application, which appears to me to be a reasonable one, comes within the power given to us by the fourth section of the statute. There can be no difficulty in obtaining the attendance of counsel at *Paris* and *Boulogne*. The rule must be made absolute.

The rule was drawn up as follows:—

The plaintiff to join in the commission, and each party to deliver written interrogatories, and to be at liberty to put other questions *vivd voce*; such other questions, with the answers, to be reduced into writing, and returned with the commission.

April 24.

DOE dem. RHODES v. ROBINSON.

A notice to quit was given by an agent, who had from time to time, received the rent of the estate, and paid the money into a bank to the credit of the landlord; but had always acted upon instructions received from the landlord's immediate agent:—*H. Id.*, that without some further proof of authority the notice was insufficient.

**EJECTMENT.** The lessor of the plaintiff was mortgagee of certain premises in the county of *York*. At the trial before *Coleridge, J.*, at the last assizes for the county of *York*, it appeared that Messrs. *Upton* and Son were the attornies and agents of the lessor of the plaintiff, and that they had employed a Mr. *Constable* to collect the rents of the mortgaged premises, who received the payment of two years' rent from the defendant. *Constable*, who was personally unknown to *Upton* and Son, received instructions from them, as to the management of the estate, and paid the rents he received into a bank, to the credit of the mortgagee. In pursuance of such employment, *Constable* signed and served the following notice to quit upon the defendant:—

"I hereby give you notice to quit the possession of the messuages, lands, tenements, and other hereditaments, which you now hold as tenant under the mortgagee in possession, of the estates of *John Chadwick*, situate in *Brenhope*, at the expiration of your now current year, and that you leave the same in a tenable state and condition. Dated this 20th day of July, 1835.

(Signed) *T. Constable*,  
Attorney and Agent for the Mortgagee."

*Constable*, who was examined at the trial, stated that he had previously given notices to quit, to other tenants who had gone out of possession; that he knew nothing about the mortgagee, and received all his instructions from *Upton* and Son. It was objected, on behalf of the defendant, that *Constable* was but the agent of an agent, and as such, had no sufficient authority to give the notice to quit. The learned judge reserved the point, and a verdict was found for the lessor of the plaintiff.

*Wightman* obtained a rule *nisi* to enter a nonsuit, or for a new trial.

Sir *G. Lewin* shewed cause.—*Goodtitle v. Woodward* (a) decides this case. There it was held that where a notice was given, signed by a stranger, professing to be an agent for all the joint tenants, their subsequent recognition of his authority before ejectment brought, was sufficient; and *Abbott, C. J.* said, "The occupier having received notice to quit, purporting to be given on the part of all the lessors of the plaintiff, had then such a notice as he could act

(a) 3 B. & Ald. 689.

upon with certainty at the time it was given. The question is, whether the agent had authority to give the notice, and I am of opinion, that the maxim of law, *omnis ratihabitio retrohabetur et mandato æquiparatur*, applies here, and that the subsequent recognition by all the lessors of the plaintiff gives effect to the authority." *Doe d. Jolliffe v. Sybourn* (d) is to the same effect; therefore the bringing this action was a recognition of the notice which had been given. *Doe d. Mann v. Walters* (e) is distinguishable from the present case, because *Constable* had previously received rent from the defendant, and had therefore been recognized as agent to the mortgagee. At all events there was some evidence of an authority existing at the time, to go to the jury, and the rule would only be made absolute for a new trial.

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*Wightman, contrd.*—The notice was given by the agent of the agent to the mortgagee, and there is no case which goes to the extent of supporting such a notice. That is the objection relied upon. No subsequent recognition was proved, and it has been held that bringing an action is not a sufficient recognition. *Doe d. Mann v. Walters* (e). If it had been proved that the mortgagee had recognized the notice before the day of demise stated in the declaration, that would perhaps be sufficient. [*Tindal, C. J.*—Or, perhaps, if it were proved that the mortgagee had authorized his agent to employ *Constable*.] Perhaps it may be so. The notice must be such as the party receiving it can safely act upon. The mere fact that other parties had acknowledged *Constable* as agent by going out of possession, does not affect the defendant.

*TINDAL, C. J.*—If this verdict were allowed to stand, we should be carrying this case beyond any former decision, because it would be holding that a notice to quit, given by the agent of an agent, is valid, without any evidence of the authority which had been given by the lessor of the plaintiff. At the same time, I am far from saying that there was no evidence, and the rule must be absolute for a new trial, and not for a nonsuit.

*BOSANQUET, J.*—I am also of opinion that there must not be a nonsuit, because I think there was some evidence for the jury.

*COLTMAN, J.*, concurred.

Rule absolute accordingly.

(d) 2 Esp. N. P. C. 677.

(e) 10 B & Cress. 626. S. C. 5 Man. & Ry. 367.

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April 25.

BLATCHFORD v. The MAYOR, ALDERMEN, and BURGESSES  
of PLYMOUTH.

Demise of a mill, together with the use of the stream of water running or flowing in the stream, excepting such part of the said stream as should be sufficient for the supply of such persons as the lessors had then already contracted, or should at any time thereafter contract, to supply with water. "Provided nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof twelve hours at least in each and every day of the said term :—"

*Held*, that this did not amount to an absolute undertaking to supply water to work the mill twelve hours a day, but that it was a demise of the mill as the water was flowing at the time of the demise.

The lessors covenanted that the lessee should enjoy the mill and stream without interruption by them, or by persons claiming under them, or by their acts or procurement; the lessee alleged as a breach, that the defendants drew and took, and caused and procured to be drawn and taken, from the stream, divers quantities of water, and interrupted the lessee in the use of the mill; the evidence was that the water was taken away by persons who claimed a right under contracts made by the lessors before they granted the lease of the mill and stream :—

*Held*, that the breach was improperly assigned.

**C**OVENANT. The declaration stated, that by an indenture of lease, dated the 30th of March, 1833, the defendants, by their then name of the mayor and commonalty of the borough of *Plymouth*, did demise, lease, grant, and to farm let, unto the said plaintiff, his executors, administrators, and assigns, a certain millhouse and mill, used for the grinding of corn and grain, commonly called or known by the name of the *Higher Grist Mill*, situate within the borough of *Plymouth*; with all and singular the mill-wheels, mill-stones, going and running gear, bolting-machine, and iron belonging to and used with the said mill, and all and all manner of other machinery, engines, utensils, implements, articles, and things whatsoever, then standing or being in or upon the said mill-house and mill; and also, a certain dwelling-house, with the appurtenances, together with the use of the stream of water, running or flowing in the leat or trench belonging to the said defendants, from the northern end of the said demised premises, into the said mill, and the launder in which the same water then ran or flowed, and the flood-hatch, sluices, and other waterworks therein, together with all erections, buildings, walls, fences, ways, paths, passages, toll, custom, benefit of grinding corn and grain, and all and all manner of other rights, privileges, advantages, easements, profits, commodities, and appurtenances whatsoever, to the said mill-house, dwelling-house, and premises, belonging or in any way appertaining; excepting and always reserving out of the said demise and grant unto the said defendants, their successors and assigns, so much and such part of the said stream of water, running or flowing in the said leat or tunnel, belonging to the said defendants, as should be sufficient for the supply of such and so many of the inhabitants of the town and borough of *Plymouth*, and all such bodies politic and corporate, officers, and departments in his majesty's service, having establishments within or near to the said borough, or other person or persons whomsoever, as the said defendants had then already contracted or agreed, or should at any time thereafter contract or agree to supply with water from their said stream or leat; *provided nevertheless, that such a quantity of water should be always left to flow to the said mill, as should be sufficient for the due working thereof for the space of twelve hours at least in each and every day of the said term* intended to be thereby granted, times of needful reparation and cleansing of the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted. To Hold the said mill-house, mill, machinery, implements, and utensils, and dwelling-house, with the use of the water running to the said mill, and the waterworks thereon, and all the premises thereby demised, with their and every of their rights, customs, liberties, privileges, advantages, members, and appurtenances whatsoever (except as before excepted),

unto the plaintiff, his executors, administrators, and assigns, for the term of twenty-one years, yielding and paying the clear yearly rent of 185*l*. And the said defendants did thereby, for themselves, their successors, and assigns, covenant, promise, and agree to and with the said plaintiff, his executors, administrators, and assigns, that he, the said plaintiff, his executors, administrators, and assigns, observing and performing the several covenants and agreements thereinbefore contained, should, and lawfully might, peaceably and quietly have, hold, use, occupy, and enjoy the said mill-house, mill, machinery, dwelling-house, waterworks, and all and singular other the premises intended to be thereby demised, with their appurtenances, for the term of twenty-one years, thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever, of or by the said defendants, their successors or assigns, or any other person or persons whomsoever, rightfully claiming or to claim by, through, under, or in trust, for them, any, or either of them, or by their, any, or either of their acts, means, consent, default, privity, or procurement.

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*Breach.*—That the said defendants, on the said 31st day of *March*, 1833, and on divers days between that day and the commencement of this suit, wrongfully and injuriously drew and took, and caused and procured to be drawn and taken, from and out of the said stream, divers large quantities of the water thereof, although the residue of the water of the said stream, which on those days was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours, on any or either of those days, although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof, required the drawing or taking thereof. And the said defendants on those days and times wrongfully and injuriously hindered, denied, molested, and interrupted the said plaintiff in the use of the said mill-house, mill, and machinery, whereby the plaintiff during all the time aforesaid had been hindered and prevented from working the said mill, and had lost and been deprived of divers great gains and profits, which might and would otherwise have arisen and accrued to him from the working of the said mill: to the damage of the plaintiff of 5,000*l*.

*Plea.*—That the defendants did not wrongfully and injuriously draw and take, or cause and procure to be drawn and taken, from and out of the said stream, the said quantities of the water thereof in the declaration mentioned, or any part thereof, although the residue of the water of the said stream, which on the said days was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours, on any or either of the said days, although no casualty of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, on any breaking of the banks thereof, required the drawing or taking thereof; nor did the defendants wrongfully and injuriously hinder, deny, molest, or interrupt the plaintiff in the use of the said mill-house, mill, or machinery, in the manner and form as the plaintiff hath above alleged.—Issue was joined.

At the trial before *Alderson*, B., at the last *Devon* summer assizes, it was in evidence that the title of the defendants to the stream in question, rested on Stat. 27 Eliz. c. 20, which empowered the then corporation of *Plymouth* to dig a trench or leat from the river *Meavey*, for the purpose of conveying water to



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*Plymouth*, and the statute provided that compensation should be made to the owner of every mill standing upon the said river.

The *Higher Grist Mill* was the second of several mills driven in succession by the water in the leat, and when the lease, mentioned in the declaration, was granted to the plaintiff, four several classes of outlets existed, whereby water was taken from the leat, before it reached the *Higher Grist Mill*, viz.—

1. The proprietor of an ancient mill, on the banks of the *Meavey* river, called *Meavey Mill*, had always exercised a right to draw from the leat, by a hatch, called the *Miller's Hatch*, such a quantity of water as was necessary to work the mill. This right accrued in consequence of the corporation of *Plymouth* having neglected to make compensation to the owner of the mill, in pursuance of the said stat. 27 Eliz. c. 20.

2. By six pipes, or ox-eye bores, varying from three inches to three quarters of an inch in diameter, water was supplied from the leat, for the household use of a few persons residing in the neighbourhood. Several of these streams had existed for a very long period, and the corporation received, in some cases, small annual sums for the use of them : in other cases no compensation was received.

3. Two tan-yards were supplied from the leat ; one by a pipe, two inches in diameter, for which the defendants received 10*l.* 10*s.* per annum, and the other by a pipe, one inch in diameter, at a yearly payment of 6*l.* 6*s.* Both these supplies had been granted by the defendants and their predecessors for many years.

4. By the stat. 5 Geo. 4, c. 49, which was passed to enable the commissioners for victualling his majesty's navy, to complete a victualling establishment at *Cremill Point*, near *Plymouth*, and to supply the establishment with water, the corporation of *Plymouth* were required to convey from the leat, by a sluice, or such other ways and means as they might judge proper, a supply equal to four hundred tuns daily, of pure, wholesome, fresh water, into the reservoir of the commissioners ; in consideration whereof the corporation and their successors were entitled to receive a net annual rent or sum of 250*l.* : and in pursuance of this statute, the daily supply of four hundred tuns had been made, through a pipe which discharged the water into a reservoir, constructed by the government officers, on the banks of the leat.

The plaintiff had been yearly tenant of the *Higher Grist Mill* before the execution of the lease. With the above-mentioned exceptions, the entire stream of water in the leat, passed to the mill, and, although it was proved that there was not a sufficient quantity of water to work the mill twelve hours a day, it appeared, that since the execution of the lease the defendants had done no further act, in the way of diversion or otherwise, to lessen the quantity of water in the leat.

A verdict was found for the plaintiff, with leave reserved to the defendants to move to set it aside, and to enter a nonsuit, upon the ground that the lease did not amount to a grant of the water for twelve hours a day ; and also that the breach of the covenant was improperly assigned.

Sir *W. Follett* obtained a rule *nisi* accordingly.

*Wilde, Serjt., Erle, and Moody*, shewed cause.—The proviso in this lease overrides the whole of the exceptions, and it amounts to a grant of the mill.

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together with so much of the water as was necessary to work the mill twelve hours per day. That is the effect of the clauses when taken altogether. The covenant for quiet enjoyment, provides against any interruption by the defendants, or by their "acts, means, consent, default, privity, or procurement;" and it is not denied that the water is supplied to other persons, by the consent, and for the profit of the defendants; nor that the water has failed to work the mill twelve hours a day. The defendants plead, that they did not wrongfully and injuriously draw the water from the stream, and upon that issue the evidence must be confined to a denial of the wrongful act, and not to matter of excuse. The word wrongful means, not contrary to the covenant, and it is immaterial whether the grant of the other diversions was before or after the execution of the lease to the plaintiff. The act for the supply of the victualling-office with water, must be considered, with reference to this question, as if it was a private act. *Brett v. Beales* (a), *The King v. Toms* (b), *Ludford v. Barber* (c). It is nothing more than a contract between the corporation of *Plymouth*, and the crown, enforced by an act of parliament. The obligations imposed by that statute, and the 27 Eliz. c. 21, are immaterial in the present case, because the corporation were bound to see that they could make this grant to the plaintiff. It can be no excuse to say that a prior grant was in existence, for the object of a covenant for quiet enjoyment is to give a security against paramount grants; and the existence of an incumbrance, created before the grant, is a breach of the covenant for quiet enjoyment. In Com. Dig. tit. *Fait*. E. 8, it is said, "Every exception is the act and words of the lessor, grantor, &c., and therefore shall be taken *strictè* against him." And the breach here is sufficiently assigned; in *Bac. Abr.* tit. *Covenant* (I.) it is laid down, "If A. covenants to permit B., his heirs, and assigns, to take and enjoy the rents, issues, and profits of certain lands, and in an action of covenant the plaintiff assigns for breach, that A. took the profits, and *non permisit* B. to enjoy, this breach is well assigned, for the taking the profits by A. is a special disturbance."

Sir *W. Follett*, *Crowder*, *Rowe*, and *Butt*, *contrà*.—The first question is whether there has been any breach of the covenant for quiet enjoyment. The plaintiff did not prove that any act was done by the defendants after the execution of the lease, whereby any part of the water was diverted from the stream. Covenants for quiet enjoyment have always been strictly construed; *Browning v. Wright* (d), *Merrill v. Frame* (e), *Hobson v. Middleton* (f), *Woodhouse v. Jenkins* (g), *Howell v. Richards* (h), *Spencer v. Marriott* (i). The water ran by the same way, and under the same circumstances, as it did before the lease was granted. It must be taken as a fact, that the plaintiff, by reason of his former occupancy of the mill, had notice of the existence of all the prior rights. *Ogilvie v. Foljame* (k). Inasmuch, therefore, as no act was proved to have been done by the defendants since the execution of the lease, they cannot, at all events, be sued for a breach of the covenant for quiet enjoyment. Nor could they be sued for not supplying the plaintiff with water sufficient to work the

(a) *M. & Malkin*, 421.(b) 1 *Doug.* 405.(c) 1 *T. Rep.* 93 a, note (a.)(d) 2 *Bos. & Pul.* 13.(e) 4 *Taunt.* 329.(f) 6 *B. & Cress.* 295.(g) 9 *Bing.* 431.(h) 11 *East.* 643.(i) 1 *B. & Cress.* 457.(k) 3 *Meriv.* 65.

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mill twelve hours a day. It is not the true construction of the lease to say that it is a demise of sufficient water to work the mill for that period. The effect of such a construction would be to make the proviso enlarge the grant, which cannot be. The defendants merely demised that which they had a right to demise, and the exception expressly refers to the contracts which had been already made. If there were sufficient water, the plaintiff was to have the use of it for twelve hours each day, and any excess belonged to the defendants. There was no warranty that the water should flow for that period to the plaintiff's mill. The proviso was inserted to prevent the defendants from making any further grants, to the prejudice of the plaintiff's right to have the water twelve hours a day, if there should be a sufficient quantity. But they have made no further grants, and the demise was of the stream as it was then running; the proviso is, that such a quantity of water "should be left to flow," as should be sufficient to work the mill for twelve hours at least. The miller at the *Meavey Mill* had paramount rights, and the defendants were bound to supply the required quantity to the victualling office, under the 5 Geo. 4, c. 49. The ox-eye bores, by which the inhabitants were supplied, were very ancient, and must have been known to the plaintiff when he accepted the lease.

TINDAL, C. J.—This is an action on a covenant for quiet enjoyment of a mill and a mill-stream; and the objection raised on the part of the defendants is, that the subject-matter in respect of which the plaintiff sues, did not pass by the deed; and that even if it did, upon the breach which has been assigned, the plaintiff is out of Court. There are, therefore, two questions. First, whether the water did or did not actually form a part of the subject-matter of the demise. It is a lease by the defendants to the plaintiff of a certain mill and machinery, "together with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the demised premises, and the launder in which the same water then ran or flowed, and the flood-hatch, sluices, and other water-works therein." Now, if the description had gone no further, I should have said that the intention of the parties was to demise the mill, and the use of the stream of water, precisely in the state in which it was flowing at the time of the grant. Then, as it is admitted that no alteration has been made by the defendants, there could be no ground of action. But it is contended that there is something engrafted into the lease, to shew that the plaintiff was to have the use of the water to work his mill twelve hours a day. Let us then examine the subsequent parts of the deed. First comes the exception:—"Except and always reserving out of the said demise and grant, unto the said defendants, their successors, and assigns, so much and such part of the said stream of water running or flowing in the said leat or trench belonging to the said defendants, as should be sufficient for the supply of such and so many of the inhabitants of *Plymouth*, and all such bodies politic and corporate, officers, and departments in his majesty's service, having establishments within or near to the said borough, or other person or persons whomsoever as the said defendants had then already contracted or agreed, or should at any time thereafter contract or agree, to supply with water from their said stream or leat." Now, if this exception had stood alone, it would be void, as being repugnant to the grant; because the defendants might have taken away all

they had granted. The meaning of an exception, as laid down in Co. Lit. 47 a, is that it is always a part of the thing granted, and of a thing *in esse*. *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.* The following proviso is then inserted :—" Provided nevertheless that such a quantity of water should be always left to flow to the said mill, as should be sufficient for the due working thereof, for the space of twelve hours at least in each and every day in the said term intended to be thereby granted." The natural and proper object of this proviso was to ride over the former part of the deed, and to limit the lessors as to future grants ;—to prevent them from diminishing the quantity of the water by making further grants. Some limitation was needed, because it was stipulated that further grants might be made by the lessors. Therefore, it does not appear to me to be the just construction of the deed, to hold that there is any absolute grant of the water for twelve hours in each day ; and consequently the deficiency which occurred in the daily supply, does not form the subject-matter of an action.

But even assuming that there was a demise of that quantity of water, has there been any breach of the covenant for quiet enjoyment ? The covenant is that the plaintiff should and lawfully might, peaceably and quietly, have, hold, use, occupy, and enjoy, the said mill-house, mill, waterworks, and premises demised, for twenty-one years, " without any lawful hindrance, denial, molestation, or interruption, of or by the defendants, their successors, or assigns, or any other person or persons whomsoever, rightfully claiming or to claim, by, through, under, or in trust for them, any or either of them, or by their, any, or either of their acts, means, consent, privity, or procurement." There are, therefore, three particular classes of acts guarded against : acts of the defendants themselves ; acts done by other persons claiming under them ; and acts occasioned by their consent or procurement. The breach assigned is, that the defendants wrongfully and injuriously drew and took, and caused and procured to be drawn and taken, divers quantities of water from the stream, and hindered, denied, molested, and interrupted the plaintiff, in the use of the mill and machinery. The evidence was, not that the defendants had done or caused others to do, any act since the execution of the lease, but that nothing whatever was done, and that the quantity of water was diminished by persons who had prior rights under former grants. It appears to me that this description of evidence, would only be applicable to a breach, that persons having prior title under the defendants had impaired the plaintiff's enjoyment. To shew a breach of this covenant, something done by the defendants or by their privity, subsequent to the demise, ought to be proved. In Com. Dig. tit. *Pleader*, 2 V. (2), it is laid down that " the breach ought to be co-extensive with the import and effect of the covenant."

It is unnecessary to go into the effect of the rights which were given by the two acts of parliament, as the rule must be made absolute on the grounds already mentioned.

PARK, J., concurred.

BOSANQUET, J.—There are two principal questions in this case. First, as to the construction to be put upon the demise, which is the most material, because it relates to the rights of the parties. It has been contended for the

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v.

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PLYMOUTH.

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plaintiff that the effect of the demise, the exception, and the proviso, when taken together, is, that there was a grant of twelve hours' water per day; but I think that is not the meaning of it. The demise is of the mill and the use of the stream of water running in the leat; then comes the exception, which reserves so much of the stream as should be sufficient to supply the inhabitants of *Plymouth* and certain public officers or other persons, as the defendants had then already contracted or should thereafter contract, to supply with water. The effect of this without any restriction would be derogatory to the grant, because it would enable the defendants to take the whole of the water. Then comes the proviso, that such a quantity of water should be left to flow as should be sufficient to work the mill at least twelve hours a-day. The sense of this must necessarily be to limit that which was to be done in future; it was to prevent the defendants from subsequently taking away more of the water, if the supply did not exceed the quantity necessary to work the mill twelve hours a-day. But if the stream at the time of the demise did not supply that quantity, there was no engagement to leave water enough to work the mill twelve hours a-day. If that be so, there is an end to the plaintiff's claim.

But supposing that to be doubtful; the question would then be, whether the defendants are liable to be sued for a breach of the covenant for quiet enjoyment. The plaintiff contends that the covenant relates to acts done by the defendants before the lease was made, whether in pursuance of acts of parliament or not. It is quite unnecessary to enter into the question as to the effect of the acts of parliament, because there are contracts made with private individuals, and if any one of them has been improperly supplied with water, the plaintiff would be entitled to recover, if the breach be properly laid. We must, therefore, consider whether the breach is properly assigned. The covenant is against the acts of the defendants, or any persons claiming under them, or acts done by their privity or procurement. How is the breach assigned? Not that certain persons claiming under the defendants, by contracts made prior to the demise, had disturbed the plaintiff in the enjoyment of the mill-stream, but that the defendants drew, and caused and procured to be drawn, certain quantities of water, and wrongfully and injuriously hindered the plaintiff in the use of the premises. Now it is clear that nothing has been done to alter the state of the water, since the date of the demise: it is contended that the defendants caused and procured the water to be drawn, but it appears to me that this form of breach does not meet the facts; and if the plaintiff complained of the former contracts, the breach ought to have been framed to meet that state of circumstances. I therefore agree that a nonsuit must be entered.

COLTMAN, J.—It would be sufficient to decide this case upon the form of the declaration, inasmuch as the breach is not properly framed: but as that does not touch the rights of the parties, it is necessary and just, to state our opinion upon the substantial question in the cause. I cannot but observe that it was improbable that the defendants should enter into such a contract as that contended for by the plaintiff. The plaintiff had been in the occupation of the mill, and was aware of the state of the stream, and he could not have supposed that the defendants intended to give up the benefits which were derived from the then existing contracts; but I should not decide the question

upon that ground, because it might be importing facts into the case which do not appear on the face of the deed. I therefore look at the deed. What was the subject-matter of the grant? The grant is of the mill and the use of the water; but a proviso, and still less an exception, cannot enlarge the extent of the grant. The deed is very inartificially drawn, and, as an exception must be part of the thing granted, it naturally raised an idea that the whole of the stream passed by the grant. It seems to have been introduced partly through ignorance, and partly *ex abundante cautela*. But taking the whole deed together, the grant to the plaintiff was of the use of the stream, as it was flowing at the time of the demise, and as nothing has been done to alter the state of the lease since that time, I agree that this rule must be made absolute.

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Rule absolute.

JAULEREY v. BRITTON.

April 15.

IN an action of trover against a wharfinger to recover certain goods, the defendant pleaded four pleas. First—not guilty; secondly, that the goods were the property of the plaintiff; and lastly, two pleas, which stated that the goods had been deposited with the defendant as a security for a bill which he had discounted for a third person. An application was made to a learned judge at chambers, who ordered the two last pleas to be struck out.

In trover against a wharfinger, the Court allowed the following pleas: first, not guilty; secondly, that the goods were not the plaintiff's goods; and thirdly, that they had been deposited with the defendant by a third party, as a security for money advanced.

Hoggins moved that the whole of the pleas might be allowed.—The two last pleas shew a defence which can be supported under the provisions of the Factors' Act, 6 Geo. 4, c. 94, and they are essentially different from the two first. [*Vaughan, J.*—There is a case of *Leuckart v. Cooper (a)*, where a lien under the Factors' Act was specially pleaded.]

W. H. Watson shewed cause in the first instance.—If the two last pleas are founded on the Factors' Act, they afford no answer to the action: and the plaintiff will be driven to a demurrer. In *Stancliffe v. Hardwick (b)*, the effect of the plea of not guilty in trover was considered; and it seems that if there be a lien, there can be no wrongful conversion, and that the plea of not guilty is sufficient.

TINDAL, C. J.—We cannot go into a nice discussion on the effect of the Factors' Act. The pleas may be allowed; but as the application might have been made before, the amendment must be upon payment of costs.

BOSANQUET, J., and VAUGHAN, J., concurred.

Rule absolute accordingly.

(a) 1 Hodges, 16.

(b) 1 Gale, 127.

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April 28th.

GOWER and others v. VON DADELSZEN and another.

A contract was made for the sale of a cargo of good merchantable *Gallipoli* oil, consisting of 240 casks, containing 901 salms and 9 pignatelles, at 54*l.* per imperial ton of 7 and 1-5th salms. An action being brought against the defendant for not performing the contract, he pleaded that the said casks containing the oil were not well seasoned or proper casks for the purpose of containing good merchantable *Gallipoli* oil, but were badly seasoned, and unfit and improper casks for such purpose: *Held*, upon demurrer, that the plea was no answer to the action, because it took issue upon that which was not of the essence of the contract, and because the objection went only to a part of the consideration.

DEMURRER to a plea. The declaration was in assumpsit, and alleged that it was mutually agreed between the plaintiffs and the defendants, that they, the plaintiffs, should sell to the defendants, who should buy of and from the plaintiffs, a certain cargo of good merchantable *Gallipoli* oil, then being the cargo of the vessel *Fortuna*, the captain whereof was one *Giovanna Cafeiro*, and which vessel was then on her voyage from *Gallipoli* to *Falmouth* or *Plymouth*: the said cargo consisting of L. R. 240 casks, containing 901 salms and 9 pignatelles, at 54*l.* per imperial ton of 7 and 1-5th salms, and which then amounted in the whole to a large sum of money, to wit, the sum of 6756*l.* 17*s.* 2*d.* payable by cash less 2½ per cent. discount, and which discount then amounted to a large sum of money, to wit, the sum of 168*l.* 18*s.* 5*d.* on delivery of bill of lading on her arrival at *Plymouth* or *Falmouth*, to either of which ports the plaintiffs were, and agreed to pay freight, insurance, and gratuity; and if the said vessel should be lost on her voyage to *Falmouth* or *Plymouth*, the said agreement was to be void.

Averment—That the said vessel arrived on her said voyage, and at the time of such arrival had on board a cargo of good merchantable *Gallipoli* oil, consisting of L. R. 240 casks, containing 901 salms and 9 pignatelles, being the said cargo in the said agreement and hereinbefore mentioned, of which the defendants had due notice; and that thereupon, and within a short and reasonable time in that behalf after such arrival at *Plymouth* aforesaid, of the said vessel as aforesaid, they, the plaintiffs, tendered and offered to deliver to and leave with the defendants a certain bill of lading of the said cargo, being the bill of lading in the said agreement and hereinbefore mentioned, upon their, the defendants, paying to the plaintiffs the aforesaid price of the said cargo in manner aforesaid; and the plaintiffs were then ready, and willing and liable, to pay, and did in point of fact pay, the freight, insurance, and gratuity in the said agreement, and hereinbefore mentioned to be payable by them; and the plaintiffs were then ready and willing, and offered to the said defendants to deliver to them, the defendants, and requested them, the defendants, to accept and receive the said cargo at *Plymouth* aforesaid, upon their, the defendants, paying to the plaintiffs the aforesaid price thereof in manner aforesaid.

Breach—That the defendants did not, nor would, when so requested, as aforesaid, or at any other time, take, accept, or receive, the said bill of lading or cargo at *Plymouth*, or pay to the plaintiffs for the same cargo the aforesaid price, in manner or with the deduction and discount aforesaid, or any part thereof, but then wholly neglected and refused so to do, whereupon the said plaintiffs sold the said cargo by public auction, at a less price than the price in the said agreement mentioned, by 1032*l.* 4*s.* 4*d.*, which last-mentioned sum was thereby wholly lost to the plaintiffs, and they were then also obliged to expend, and did expend, 266*l.* 9*s.* 9*d.* in selling the said cargo; to the damage, &c.

The defendants pleaded, seventhly, that the said casks containing the said oil, in the said agreement and declaration mentioned, were not at the time of the making the said agreement and promise, in the said declaration mentioned,

or at the time of the arrival of the said vessel at *Plymouth*, or at the time the plaintiffs tendered and offered to deliver to, and leave with, the defendants, the said bill of lading of the said cargo, as in the said declaration mentioned, well seasoned or proper casks, for the purpose of containing good merchantable *Gallipoli* oil, according to the terms and within the true intent and meaning of the said agreement in the said declaration mentioned; but, on the contrary thereof, were badly seasoned, and unfit and improper casks for the purpose of containing such oil as in the said agreement mentioned: wherefore the said defendants did not nor would take, accept, or receive, the said bill of lading and cargo at *Plymouth* aforesaid, and neglected and refused to pay to the plaintiffs for the said cargo the said price, in manner and form as in the said declaration alleged; and this the defendants were ready to verify.

Demurrer for the following causes:—That the defendants had not traversed or attempted to put in issue any matter of fact alleged, or necessary to be alleged, by the plaintiffs in their declaration, but had introduced and attempted to put in issue a matter of fact not alleged, nor necessary to be alleged, namely, whether the casks containing the oil were, at the several times mentioned in the said plea, well seasoned or proper casks for the purpose of containing good merchantable *Gallipoli* oil, according to the terms and within the true intent and meaning of the said agreement; without in their said plea shewing, or making it in any way appear, that the sufficiency or good quality of the casks was either expressly, or by necessary implication, warranted, or contracted, or agreed for, by the plaintiffs, in their said agreement; and that if it were the intention of the defendants, by their said plea, to set up any usage or custom by which the sellers of *Gallipoli* oil, under the circumstances in the declaration mentioned, are or would be held, even without any express agreement to that effect, to warrant, or contract, or agree, for the proper quality and sufficiency of the casks in which the same may be contained, to the purchasers thereof; and by a breach of which warranty, contract, or agreement, any contract of sale relating to such oil is rendered voidable by the purchasers thereof, and which usage or custom might therefore be deemed tacitly to have formed part of, and to have been incorporated with, the said contract, at the time of the making thereof, they should have expressly alleged the existence of such usage or custom, and that the said contract was made with reference and subject thereto; and also that it was not alleged in the said plea that the said oil was at all damaged or rendered unmerchantable within the meaning of the said agreement, by reason of the premises in that plea mentioned; and therefore that the said plea offered no justification or excuse for the nonperformance of the said contract, and was no answer to the declaration, but evasive and argumentative, and any issue raised thereon would be immaterial; and also for that the defendants had not only alleged and attempted to put in issue the insufficiency and bad quality of the said casks, at the time of the making of the said agreement, but also at the time of the arrival of the said vessel and of the tender of the said cargo, although it was quite immaterial and irrelevant to the purposes of this action what the state of the said casks happened to be at any other time than that of the making of the said agreement, unless the defendants had alleged in their said plea that the insufficiency and bad quality of the said casks, at the times of the said arrival or the said tender respectively, had been caused and occasioned by the default of the plaintiffs; and also for that the de-

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defendants do not, in and by their said plea, allege that the said casks were intrinsically and in themselves of any less value, by reason of their said insufficiency and bad quality, than they otherwise would have been, or that the defendants would have sustained any damage in respect thereof, by reason of their accepting the said cargo; and also for that the said plea did not allege that the defendants elected to avoid, or gave to the plaintiffs, at any time, any notice of their intention to avoid the said contract or agreement, by reason of the premises in the said plea mentioned, or otherwise; and also for that the said plea was in other respects informal and insufficient.

Joinder in demurrer.

Crowder, in support of the demurrer.—This is a sale of a cargo; and the contract is confined to the quantity of the oil, which is to be paid for by the ton, and not by the cask. It is clear that the casks were proper to contain the oil, because it is not averred that the oil was not in a fit state for delivery. The casks are not of the essence of the contract, but are a mere vehicle for conveying the oil, as bags are for conveying wool. The plea does not state that the oil was unmerchantable, or that there was any express or implied warranty as to the casks, or any fraud on the part of the plaintiffs. *Parkinson v. Lee* (a).

Maule, contrâ.—The casks, as well as the oil, were the subject of the sale, and the meaning of the parties was that they should be proper casks of oil. If a person sells a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. *Gray v. Cox* (b), *Jones v. Bright* (c). If the casks were not of a merchantable quality, the purchaser has not got all that he is entitled to receive, and the plea is sufficient.

Crowder, in reply.—The cases relating to implied warranties do not apply, because the articles which were there objected to, were of the essence of the contract.

TINDAL, C. J.—I am of opinion that the seventh plea is no answer to the plaintiff's declaration. The contract is, that the plaintiffs should sell to the defendants a certain cargo of good merchantable *Gallipoli* oil, being the cargo of the vessel *Fortuna*; that is the subject-matter of the contract; all the rest is matter of description. The defendants by their plea admit that there was a cargo of good merchantable *Gallipoli* oil, but they object to that which is only accessory to the contract, and merely aver that the casks in which the oil was contained, were not well seasoned or proper casks for the purpose of containing good merchantable *Gallipoli* oil, but were badly seasoned, and unfit and improper casks for containing such oil. Now it is quite evident, that any slight imperfections in particular casks would sustain this objection, and yet such a circumstance might make very little difference in the defendants' situation. I can conceive cases where casks or bottles may be in such a state, that the articles which they contained would be in such a condition as to afford an answer to an action; as if a pipe of wine were delivered in bottles, with every cork oozing; but in such cases the plea would be, that the wine was not in a merchantable state. But this plea taking issue on that which is not of the

(a) 2 East, 314.

(b) 4 B. & C. 108.

(c) 5 Bing. 533.

essence of the contract, has this vice, that it does not go far enough; and our judgment must be for the plaintiffs.

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PARK, J.—It has been contended, by the counsel for the defendants, that this was a sale of the casks; but that is not so; it is a sale of the oil. It is also said that there was a warranty that the casks should be good and well-seasoned; but the cases which have been cited upon that point are quite different: there the commodity itself was sold; and it was held, that the thing sold should be fit for the purpose for which it was sold. But here no injury was sustained by the defendants, who did not even take the oil into their custody to examine it.

BOSANQUET, J.—The plea affords no answer to the action. This was a sale of a cargo of good merchantable *Gallipoli* oil, at so much per ton. A given quantity was sold, and it must be packed up and contained in something; and the contract describes it as being packed in 240 casks. The declaration avers the arrival of the vessel with a cargo of good merchantable *Gallipoli* oil, in the number of casks and containing the quantity mentioned in the declaration, and that the plaintiffs tendered the cargo to the defendants. The defendants' answer is, that the casks were badly seasoned, and were unfit and improper casks for containing such oil, but that is not a sufficient answer. Even if all the casks were defective in the number of hoops, so that a quantity of oil had been lost, that would not afford an answer to the action, unless the oil had been injured; because it does not go to the essence of the contract. Suppose a certain number of bales of cotton of a certain quality were sold, and that the cotton arrived of the quality required, with some of the bales rent; it would be of dangerous consequences to say that such a defect would avoid the contract.

COLTMAN, J.—This plea is no good answer to the declaration, because it does not go to the whole of the consideration. It was a sale of a quantity of oil, and I will even suppose it was a sale of the casks also. These two things were sold; but in objecting to the quality of the casks, the objection goes only to a part of the consideration. The matter is quite plain.

Judgment for the plaintiffs.

LINDSAY v. WELLS.

May 6.

IN an action on a bill of exchange a rule *nisi* was obtained, calling upon the plaintiff to shew cause why the declaration should not be amended, or otherwise set aside, for irregularity, on the ground that the plaintiff was described as *Henry H. Lindsay*.

In an action on a bill of exchange, the declaration described the plaintiff as "*Henry H. Lindsay*." A rule was obtained by the defendant re-

W. H. Watson shewed cause.—The defendant ought to have applied to a judge at chambers to have the declaration amended, under sec. 11 stat. 3 & 4

quiring the plaintiff to amend, by inserting his full name; but the cause of the omission being satisfactorily shewn, the rule was discharged.

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W. 4, c. 42. The bill of exchange describes the plaintiff as *Henry H. Lindsay*, and by sec. 12 of the same statute, it is expressly directed that in such a case it shall be sufficient to describe the party "by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full." The defendant would have been given the information which he now requires, but the action is brought by virtue of a power of attorney, given by the plaintiff in *America*, which is signed *Henry H. Lindsay*, and his agent in this country does not know his true name.

Thomas, in support of the rule.—The eleventh section of the statute only applies to the misnomer of *defendants*; that was the opinion of a learned judge, to whom application was made before this rule was obtained.

TINDAL, C. J.—As it is admitted, that this case is not within the terms of the eleventh section, we cannot interfere. The rule must be discharged.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

TIPPER v. BICKNELL and another.

The declaration stated, that H. R. was desirous of obtaining certain deeds deposited with W. B., and that H. R. applied to the plaintiff to accept certain bills, for his accommodation, to enable him to endorse the said bills to W. B. as a payment for his interest in the deeds, and H. R. offered to procure the defendants to undertake to deliver the said deeds to the plaintiff, on the payment of the bills so accepted; that the bills were accordingly drawn, and H. R. requested the defendants to undertake to deliver the deeds to the plaintiff; of all which the defendants had notice; and that thereupon, in consideration of the plaintiff accepting the bills, the defendants undertook and promised the plaintiff to deliver the said deeds to him when the bills should be paid. Averment, that the bills were accepted, and duly paid, but that the defendants had not delivered the deeds to the plaintiff, in pursuance of their undertaking:—*Held*, upon demurrer, that a sufficient consideration appeared to support the defendant's promise.

ASSUMPSIT. Demurrer to a declaration, which stated, that before the making of the agreement and promise of the defendants hereinafter mentioned, the defendants, on the occasion hereinafter mentioned, represented to the plaintiff, that certain mortgage-deeds and writings, to wit, &c. had been deposited with certain persons, to wit, the said *W. Bicknell* and one *W. Blewitt*; that at the time of the making the agreement and promise of the defendants next mentioned, one *Hugh Rowland* was desirous of purchasing and taking an assignment from the said *W. Bicknell* and *W. Blewitt* of their interest in the said mortgage, at the sum of 500*l.*, to be paid by the said *H. Rowland*; and to obtain good bills to that amount, in order to satisfy the said sum of 500*l.*; and that thereupon, to wit, on, &c. the said *H. Rowland* requested the plaintiff to accept, for the accommodation of the said *H. Rowland*, two bills of exchange, to be drawn by the said *H. Rowland* upon the plaintiff, each for 250*l.*, and payable to the order of the said *H. Rowland*, at twelve months date, for the purpose of enabling the said *H. Rowland* to use the said bills for his own benefit, that is to say, for the purpose of enabling him to indorse the said bills to the said *W. Bicknell* and *W. Blewitt*, for the said sum of 500*l.*, to be paid as the consideration for the said assignment by *W. Bicknell* and *Blewitt* in the said mortgage; that the said *H. Rowland* then offered the plaintiff, as a security for the repayment of such monies as he might pay

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upon the said bills, that he, the said *H. Rowland*, would cause and procure the defendants to undertake to deliver to the plaintiff the said deeds and writings, on the payment of such bills of exchange; that thereupon the plaintiff consented, and was ready and willing to accept such bills of exchange for the purpose and upon the terms aforesaid, and upon such security as aforesaid; that thereupon, to wit, on, &c. the said *H. Rowland* then drew the said bills of exchange upon the plaintiff, payable as aforesaid; that the plaintiff then agreed to accept the same for the purposes and upon the terms aforesaid, and upon such security as aforesaid, that the said *H. Rowland* then requested the defendants that, on the plaintiff's accepting the said bills as aforesaid, they, the defendants, would undertake to deliver to him the said deeds and writings, on the payment by him, the plaintiff, of the said bills, according to the tenor and effect thereof; of all which premises the defendants then had notice, and then represented to the plaintiff, that the said deeds and writings had been so deposited as aforesaid; that thereupon, in consideration of the plaintiff's accepting the said bills for the purpose and on the terms aforesaid, the defendants then undertook and promised the plaintiff to deliver to him, as such nominee of *H. Rowland*, the said deeds and writings, on the payment by him of the said bills of exchange respectively, according to the tenor and effect thereof.

Averment, That the bills were accepted by the plaintiff, and delivered to *Rowland*, who indorsed them to *Bicknell* and *Blewitt*, and that the bills were paid by the plaintiff when they became due, of which the defendants had notice.

Breach, That the defendants had neglected and refused to deliver the said deeds to the plaintiff, to his damage, &c.

Demurrer, and the causes assigned were, that the plaintiff had not shewn any consideration in law for the promise; and that it did not appear that the acceptance of the said bills by the plaintiff was given, or the said bills paid by the plaintiff at the instance of the defendants, or that the defendants in any way assented to the offer made by the said *Rowland* of the said deeds as a security; or that the plaintiff was induced to accept the bills of exchange by the offer of such security, or by virtue of any application by the defendants to him made so to do, or that the defendants were parties to, or in any way assented to the alleged arrangement; or that the said deeds were ever in the possession or control of the defendants; or that they had at any time any interest therein, or in the said mortgage, or the said assignment thereof, or in the payment of the said bills; or that the defendants had ever represented to the plaintiff that the deeds had ever come to the hands of them, the defendants; and for that the promise in the declaration was a mere *nudum pactum*, upon which no action could be sustained.

Joinder.

The margin of the paper-book was thus marked: "The plaintiff will contend, that the declaration shews a sufficient consideration for the defendants' promise that is to say, the obligation which the plaintiff imposed on himself by accepting the bills, although all the defendants may not have been thereby benefited. That it was not necessary to allege that the bills were accepted at the defendants' request, as the consideration for their promise was not executed, but concurrent or executing; and that the defendants were responsible to the plaintiff on their absolute engagement to deliver the deeds to him."

Crowder, in support of the demurrer.—The main question is, whether

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the declaration discloses any sufficient consideration for the defendants' promise. *Hugh Rowland* is the party who receives all the benefit. The bills were accepted for his accommodation, and the security which he offered, was that the defendants should deliver the deeds. There is no averment that any thing took place between the plaintiff and the defendants. In *1 Williams' Saund.* 264 (1) it is said to be necessary to state that the service was done at the special instance and request of the party who was liable, but there is no such averment here. The statement that the defendants had received notice of the arrangement, is insufficient. If the defendants received no benefit by the arrangement, a subsequent notice of its existence could not render them liable. In *Price v. Easton (a)*, the declaration stated, that W. P. owed the plaintiff 13l., and that in consideration thereof, and that W. P. at the defendant's request, had promised defendant to work for him at certain wages, and who, in consideration of W. P. leaving the amount which might be earned by him in the defendant's hands, the defendant undertook and promised to pay the plaintiff the said sum of 13l.; but it was held that the plaintiff was a stranger to the consideration, because he might have been entirely ignorant of the arrangement between W. P. and the defendant. That is this case.

*Stephen, Serjt., contra*, was stopped.

TINDAL, C. J.—Taking the whole declaration together, it appears to me that a promise was made by the defendants, that on the plaintiff's accepting the bills they would deliver up the deeds, when the bills were paid. If this promise had been made in respect of a past act, the declaration would have been insufficient, because it would not appear to have been done at the request of the defendants; but all the parties appear to have been present together, and the acceptance of the bills, and the promise to deliver the deeds, was a simultaneous act. The judgment must be for the plaintiff.

PARK, J.—Upon the statement made in the declaration this was a simultaneous transaction.

BOSANQUET, J.—I also think that a legal consideration for the promise appears. *Rowland* desired to obtain the possession of certain deeds, which the defendants were willing to give up, upon obtaining payment of the bills which were to be accepted by the plaintiff. During this negotiation, the bills were unaccepted, and then, it is stated that, in consideration that the plaintiff would accept the bills, the defendants undertook to deliver up the deeds when the bills were duly paid. The bills were accepted and subsequently paid; and there is abundant consideration to support the defendants' promise.

COLTMAN, J.—The argument for the defendants could only be supported by supposing a different state of facts from that which the declaration discloses. This is not the case of an executed contract; but the plaintiff was induced to accept the bills by the defendants' promise to deliver the deeds.

Judgment for the plaintiff.

## The Archbishop of CANTERBURY v. TUBB.

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May 8.

**WILDE**, Serjt., had obtained a rule *nisi*, calling upon the defendant to shew cause why an order made by *Gaselee*, J., should not be discharged; and why the defendant should not be deemed to have had sufficient oyer of the bond upon which the action was brought; or why the production of the bond to the defendant's attorney at the register-office of Doctors' Commons, at such time as this court should direct, should not be deemed sufficient oyer of the said bond, the plaintiff undertaking to pay the defendant the costs of attending to inspect the same. It appeared by the affidavits, that the defendant was one of the sureties of *Catharine Tubb*, to whom administration of her deceased husband's effects had been granted by the *Prerogative Court of Canterbury*, and who had given the usual administration-bond required by stat. 22 & 23 Car. 2 (a). One of the conditions of the bond was that the administratrix should exhibit an inventory of the deceased's effects, in the registry of the court; but she having failed to do so, and her place of residence not being known, *Crawley* and *Sharman*, creditors of the deceased, commenced an action of debt on the bond against the defendant, for a breach of this condition. No assignment of the bond was taken from the archbishop, nor had his authority to bring the action been obtained. The declaration made profert of the bond in the usual way, and the defendant demanded oyer, whereupon the attorneys of *Crawley* and *Sharman*, gave the defendant a copy of an office copy of the bond, which was authenticated by the deputy registrars of the *Prerogative Court*, and produced the authenticated copy at the time of the service. An application was then made by the defendant to *Gaselee*, J., at chambers, to stay the proceedings in the action, until the original bond had been brought to the defendant's attorney's office, and the learned judge made the order as prayed. *Crawley* and *Sharman* subsequently presented a petition to Sir *Herbert Jenner*, the judge of the *Prerogative Court*, praying that one of the officers of the court might produce the bond at the office of the defendant's attorney; but after the respective parties had been heard by their advocates and proctors, the petition was dismissed. The bond was deposited in the registry-office, and any person was allowed to inspect it on payment of one shilling.

A creditor sued a surety for the breach of an administration-bond, given in pursuance of 22 & 23 Car. 2; without obtaining an assignment of the bond from the archbishop, or his permission to use his name; and the *Prerogative Court* having refused to allow the bond to be taken to the defendant, who had craved oyer, this court discharged a rule to set aside a judge's order, which had been obtained to stay further proceedings in the action, until the bond was brought to the defendant.

*R. V. Richards* and *Arnold* shewed cause.—It was necessary in this case to make a profert of the bond upon which the defendant was sued; and the Courts have always required that the rule as to giving oyer, should be strictly observed. The practice has been said not to depend upon any particular rule of court, but on the general right of law, which the court cannot dispense with. *Soresby v. Sparrow* (b). Here the plaintiff has made profert of the bond, and has not shewn in the declaration, that the defendant is not entitled to claim oyer, which is the usual course when an excuse for its non-production is offered. *Totley v. Nesbitt* (c), *Matison v. Atkinson* (c). The service of the copy was insufficient, because the original was in existence at the *Prerogative Office*; but the defendant was not bound to go there; it

(a) See 1 Williams' Exors. 332.

(b) 2 Strange, 1186. S. C. 1 Wils. 16.

(c) Cited in *Read v. Brookman*, 3 T. R. Rep. 153.

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was the duty of the plaintiff to bring the deed to the defendant. *Page v. Divine* (d). But there is a still stronger reason why the court will not interfere. The bond has been put in suit without any assignment from the Archbishop of Canterbury, and without his consent. The order of the *Prerogative Court* ought to have been obtained before the proceedings were commenced, *Archbishop of Canterbury v. Robinson* (e); and it is essentially necessary that this should be so, or the archbishop might be made liable to pay costs to an enormous amount. In the *Archbishop of Canterbury v. Tuppen* (f), the bond had been pronounced to be forfeited before it was put in suit; and it has always been considered that the *Prerogative Court* alone has power over these bonds; if it were once determined otherwise, hundreds of actions would be commenced against innocent sureties. Nor would this court have any power to order the *Prerogative Court* to give oyer of the bond, as may be done in the case of a private individual, in whose hands it may happen to be. *White v. Earl of Montgomery* (g).

*Wilde, Serjt., contra.*—No complaint is made by the *Ecclesiastical Court* authorities; but the question is whether a dispensation of the production of the bond has been shewn. A creditor is entitled *ex debito justitiæ* to sue upon the bond; that was held by Lord *Mansfield, C. J.*, in the *Archbishop of Canterbury v. House* (h), who said, "that though a creditor had no concern in the latter part of the condition respecting the distribution of the surplus among the next of kin, yet he was most materially and principally interested in the administration, delivering in a true inventory, and in the due administration of the effects."

*TINDAL, C. J.*—This is a case *prime impressionis*, and I am not satisfied that we have authority to substitute this mode of giving oyer, for that which is in ordinary use. If we were to grant this rule, it seems to me that we should determine, on a mere point of practice, a most important question connected with the administration of ecclesiastical law; for we should be taking from the *Prerogative Court* the power of deciding whether an administration-bond should or should not be enforced. Although Lord *Mansfield* (h) held that a creditor was entitled to sue upon the bond, in the name of the archbishop, yet that must be taken with some qualification, as that he should permit his name to be used, or the archbishop might be otherwise liable to pay costs to an enormous amount. There will be no failure of justice in this case, because an application for a mandamus, to compel the production of the bond, will bring the nominal plaintiffs and the *Prerogative Court* face to face; at present we decide nothing as to the rights of the parties, and as this is the first question which has arisen on the point, the rule must be discharged without costs.

*PARK, J.* and *BOSANQUET, J.*, concurred.

*COLTMAN, J.*—From the first I have had a strong opinion, that this motion

(d) 2 T. Rep. 40.  
 (e) 1 Cr. & Meeson, 181.  
 (f) 8 B. & Cress. 151.

(g) 2 Strange, 1198.  
 (h) Cowper, 140.

could not be acceded to. The grant of oyer of the bond must be the act of the *Prerogative Court*. If the creditor has a clear right to sue the defendant, and to use the archbishop's name, he will find means to have the bond produced.

Rule discharged.

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**INTRUSION.**—The writ demanded against *R. Gardner*, one-fourth part of one messuage, &c., which the demandant claimed to be his right and inheritance, and into which the said *R. Gardner* had not entry but by the intrusion which he had made into the same after the death of *Anna Maria Curtis*, who survived *Ann Piercy* deceased, and *Mary Powney* the younger deceased; of the entirety of which tenements *Richard Curtis* being seised in his demesne as of fee, gave and devised the same, amongst other tenements, to *Jonathan Gardner* and *Richard Piercy*, and their heirs; in trust, to receive and take the rents and profits thereof, and thereout to pay unto the said *Ann Piercy* a certain annuity or yearly payment during her natural life, and to *Mary Powney* a certain other annuity or yearly payment during her natural life; and in trust, to pay as well the overplus rents and profits thereof, as also to pay the whole of the rents and profits of the said devised tenements, when and as the same several annuities should respectively end and determine, unto the said *A. M. Curtis*; and the said *R. Curtis* did, in and by the said devise, direct, that from and after the decease of the said *A. M. Curtis*, the said *Jonathan Gardner* and *Richard Piercy*, and their heirs, should stand seised of the said devised tenements, subject to the said annuities, to the use of the children of the said *A. M. Curtis*, as the said *A. M. Curtis*, should by any deed, will, or writing whatsoever, to be by her, whether she should be covert or sole, from time to time limit, direct, and appoint; and for want of such limitation, &c. then that the said *J. Gardner* and *R. Piercy*, and their heirs, should stand seised of the said tenements, to the use of such children of the said *A. M. Curtis* as should survive her in tail; remainder to the use of such nephews and nieces of *R. Curtis*, in fee, as *A. M. Curtis* should appoint; remainder as to one-fourth part to the use of one *William Piercy*, and his heirs. And which said one-fourth part above demanded and so devised, after the death of the said *A. M. Curtis*, who survived the said *Ann Piercy* and *Mary Powney*, the said *A. M. Curtis* never having had issue, and never having made any appointment of the said tenements, ought to come and remain to the demandant, as son and heir of one *William Piercy*, who was son and heir of the said first-named *William Piercy*. The count, after reciting the writ, alleged that *Richard Curtis* was seised by taking the *esplees* within fifty years, and died seised on the 1st of *January* 1787, without revoking his will; whereupon and whereby, and under and by virtue of the said last will and testament of the said *R. Curtis*, the said *J. Gardner*, and *R. Piercy*, then and there became and were seised of and in the said tenements, with the appurtenances, upon the trusts, and to and for the intents and purposes in the said will expressed and declared. That the said *A. M. Curtis* and *Anne Piercy*, and the said *Mary*

1. A writ of intrusion may be maintained, for an intrusion made after the determination of an estate, *par autre vie*.
2. A devisee is entitled to sue by a writ of intrusion.
3. The limitation for suing out a writ of intrusion is fifty years, under stat. 32 Henry 8, c. 2.



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Powney, and also the said first-named *W. Piercy*, survived the said *R. Curtis*, and that the said *A. M. Curtis* survived *Anne Piercy* and *Mary Powney*, and the first-named *W. Piercy*, and afterwards, to wit, on the 1st of *January* 1806, died, never having had any issue, and never having made any limitation, direction, appointment, or gift of the said tenements so devised, or any part thereof, according to the form and effect of the said devise; and thereupon, by virtue of the said devise, the right to the said one undivided fourth part above demanded of and in the said devised premises, with the appurtenances, came to and remained to *W. Piercy* the younger, who was son and heir of the said first-named *W. Piercy*; that afterwards, to wit, on the 1st of *January* 1815, the said *W. Piercy* the younger died, upon whose death the right to the said one undivided fourth part above demanded of and in the said devised tenements, with the appurtenances, descended and came to the said demandant, as son and heir of *W. Piercy* the younger, and into which the said *R. Gardner* had not entry, but by the intrusion which he made into the same after the death of the said *A. M. Curtis*; and therefore he brought his suit, &c.

The tenant, having traversed a matter in one of the pleas which was not alleged in the count, the demandant demurred; and the tenant then objected to the validity of the count.

*R. V. Richards*, for the tenant.—There are three objections to the count. 1. *Anna Maria Curtis* took an equitable estate only; 2dly, Intrusion will not lie for a devisee; and, 3dly, If it does, it can only be maintained within twenty years. In *Coke Lit.* 277 (a), it is said, "Intrusion first properly is, when the ancestor died seised of any estate of inheritance, expectant upon an estate for life, and then tenant for life dieth, and between the death and the entry of the heir an estranger doth interpose himself and intrude." And in *Fitz. N.B.* 203, the rule is laid down as follows:—"When tenant for life, or dower, or by curtesy dieth, seised of such estate for life, and after their death a stranger intrudeth upon the land, he in reversion shall have this writ against the intruder." A similar definition is adopted in *Booth on Real Actions*, 181. It appears from these authorities that intrusion does not lie for an entry after the determination of an equitable estate; there must be a legal estate. Then did *Anna Maria Curtis* take a legal life estate under the will of the testator? She did not; because as the premises were devised to trustees, to discharge the annuities and to pay the overplus rents and profits, they necessarily took the legal estate in the premises; according to the authorities collected in 1 *Parry on Devises* (a).

Secondly. The writ of intrusion lies only for a reversioner or remainder man, and not for a devisee. There is no authority to be found to shew that a devisee has ever brought this action, and there is no form of such a writ in the *Register* or in *Fitzherbert*. In *Romilly v. James* (b), this point was raised in argument, but the case was decided upon another ground. It was there contended that a devisee could not sue out a writ of intrusion, and the argument there used, is applicable to the present case. It is true that in *Eastman v. Baker* (c), a demandant claiming under an executory devise, re-

(a) *Jarman's* ed. page 222; see also *White v. Parker*, 1 *Hodges*, 112. *Doe d. Gratrix v. Roe*, 1 *Will. Wol. & Dav.* 18.

(b) 6 *Taunt.* 263.

(c) 1 *Taunt.* 174.

covered on a writ of intrusion; but the attention of the court was not called to this question by the counsel on either side, and the case turned on the construction of a devise.

Thirdly. The period of limitation is twenty years, and therefore this action is commenced too late. This question depends on the construction of stat. 21 Jac. 1, c. 16. The former stat. 32 Hen. 8, c. 2, sec. 2, limited the right to a seisin or possession of the ancestor within fifty years; but by the general terms of the statute of *James*, writs of intrusion are included, and the period is limited to twenty years. That some descriptions of real actions are included in the statute is clear, as *formedons* are expressly mentioned. There is no authority upon this point, although it was noticed in argument in *Widdowson v. The Earl of Harrington* (d).

*Stephen*, Serjt., for the demandant.—Neither of the points made for the tenant can be supported. First, it may be admitted, that *Anna Maria Curtis* had only a trust estate, and it may be admitted further, that there must be a legal life estate existing, to support the demandant's case. But here the trustees were seised of a legal estate, *pur autre vie*, and upon the death of *A. M. Curtis*, *William Piercy*, the next in remainder, was in a situation to support an action, after the intrusion. The demandant now claims for an intrusion upon the determination of an estate, *pur autre vie*. *Jones v. Lord Say and Seale*, 8 Vin. Abr. 262. Nor can any authority be cited to prove that it is necessary to shew when the life estate was determined. It is immaterial how it was determined. Secondly, this action may be supported, as being in the nature of a writ of intrusion which is given by the stat. West. 2. That was contended in *Romilly v. James* (e), even in the case of an executory devise over, and the argument was not overruled by the court. In 2 *Reeves' Hist. Eng. Law*, 202, it is said, "that in cases where complainants were entitled to a writ in the chancery, grounded upon the fact of another, the complainants should not depart from the king's court without remedy, because the land was transferred from one to another: as because there was no writ in the register in the chancery to be adapted exactly to that special case, but the form of the writ was only to be had against the very person who actually raised the nuisance; so that, should the house, wall, or the like, which occasioned the nuisance, be aliened to another, a writ was denied. That justice might no longer be delayed for want of legal remedies, it was now enacted, that when a writ was granted in one case, and a thing happened in *consimili casu*, and needing a similar remedy, a writ should be made accordingly." And again (f):—"Not content with the writ of trespass in its old form, they endeavoured to make it more universal by enlarging its scope and modifying its terms, so as to adapt it to every man's own case; in doing which they availed themselves of the stat. of West. 2, authorizing writs to be framed in *consimili casu*." In *Eastman v. Baker*, (g), a writ of intrusion was brought by a devisee, and he recovered without objection being made that he was not entitled to such a remedy. In *Smith v. Coffin* (h) it was held that the right to bring a real action passed to the assignees of a bankrupt; yet no form of a writ given to assignees would be

(d) 1 Jac. & W. 547.

(e) 6 Taunt. 263.

(f) Vol. 3, page 89.

(g) 1 Taunt. 174.

(h) 2 H. Black. 445.

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found in the register. This shews that, to a certain extent, the old remedies are plastic.

With respect to the period of limitation, there can exist no reasonable doubt. The writ of intrusion is clearly provided for by the stat. 32 Hen. 8, and the period there assigned is fifty years. But the stat. of 21 Jac. 1, c. 16, does not expressly or impliedly relate to such writs. The only real actions to which that statute is applicable are the various kinds of *formedons*.

*R. V. Richards*, in reply.—*A. M. Curtis* is treated as the tenant for life in the count, and the pleadings ought to have been differently framed, if the demandant relied on the legal estate, *pur autre vie*, in the trustees. The trustees might have died before *A. M. Curtis*, and a special occupancy may have happened. Nor is it stated when the trustees died, or that they are dead.

*Cur. adv. vult.*

TINDAL, C. J.—The plea which was lastly pleaded having been held bad in the course of the argument, on the ground of its traversing a fact which is not alleged in the count, the tenant then proceeded to take objections against the sufficiency of the count itself, and the objections taken have been three in number. First, that *Anna Maria Curtis*, upon whose death the intrusion of the tenant is alleged to have taken place, appears upon the face of the count to be only an equitable tenant for life. Secondly, that the demandant makes title by devise, and not by descent. And lastly, that he has counted on a seisin of his ancestor within fifty years; whereas, as it is contended, a writ of intrusion is not maintainable, unless where the demandant can shew a seisin within twenty years next before the writ sued out. As to the first objection, it is to be observed, that as it is not raised upon a special demurrer to the count pointing out any want of form in the statement of the demandant's title, it must be considered as if it were taken upon general demurrer; in which case, by the statute 27 Eliz. c. 5, the judges are directed to give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of form, in any writ, declaration, or other pleading, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer. The question, therefore, becomes this,—whether the count shews upon the face of it a defective and insufficient title in the demandant to maintain the writ; or whether it shews a title which is good in substance, though set out informally, and without sufficient certainty. For whilst in the former view of the question the count must be held to be bad, in the latter the objection is not maintainable, not having been pointed out as cause of special demurrer. The objection relied upon is, that *A. M. Curtis*, upon whose death the intrusion of the tenant is alleged to have taken place, appears to have no more than an equitable estate for life; that is, in the eye of a court of law, no estate at all; and, consequently, that no intrusion, in the legal sense of that word, can have taken place, intrusion being the wrongful act of a stranger in taking the possession after the death of the tenant for life, to the prejudice of the reversioner or remainder-man. But looking at the statement of the title in the count, we find no allegation that *A. M. Curtis* was the tenant for life, upon whose death the intrusion took place; and looking at the legal con-

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struction of the devise, and the circumstances which are stated in the count to have taken place, we think the necessary inference is that *Gardner* and *Piercy* were seised of the legal estate in the premises, during the life of the said *A. M. Curtis*, that is, that they were tenants for her life. For as to the nature of their estate, we cannot entertain a doubt that they may be considered as tenants *pur autre vie*, notwithstanding they are directed by the will to pay the profits over to the *cestui que vie*, precisely in the same manner as if they had been allowed to take such profits to their own use; the count, therefore, appears to us to be good in substance, provided the writ of intrusion be maintainable by him in remainder, for an intrusion made after the determination of an estate *pur autre vie*. And as to that question, it must be admitted that no precedent can be found in the entry-books of such a count; but, on the other hand, there is every reason by analogy and strong authority to shew that it may be maintained. The estate of tenant for term of life is defined by *Littleton* (s. 56), to be for term of the life of the lessee, or of another man; and it is obvious that the remedy by writ of intrusion would be very incomplete, if it would not apply to an intrusion after the determination of each instance of an estate for life; for if tenant for his own life assigns over to another, that other becomes directly tenant *pur autre vie*; and the remedy would fail. And the definition given of a writ of intrusion in *Finch's Law*, p. 195, a book of high authority, expressly comprehends the case in question. "Intrusion," says *Finch*, "is after the death of tenant for life, be it a man's own life, or another man's in dower or by courtesy," &c., with which agrees in effect the book called *Termes de la Ley*:—"Intrusion is a writ which lies against him who enters after the death of tenant in dower, or any other tenant for life, and holds out him in reversion or remainder." The objection, therefore, appears to us to amount to no more than that the allegation of the determination of the legal estate for life in the trustees, upon the determination of which the intrusion took place, is not alleged with sufficient form and preciseness, and, consequently, to amount to ground of special demurrer only, so that it cannot be insisted upon in the present state of the pleadings. The second objection is one which, if it is good in point of law, may undoubtedly be taken advantage of on general demurrer, viz., that a demandant who claims title under a devise cannot maintain a writ of intrusion. No express authority has been cited for this proposition, though undoubtedly, on the other hand, no precedent can be found in the older books of entries of a count so framed; one reason for which may be, that until the statutes of devises, 32 & 34 Hen. 8, a remainder created by devise could never exist, except in cities and boroughs, where a custom to devise prevailed, and in those cases the customary writ of *ex gravi querela* would have been the proper remedy for an injury of the nature now complained of. (See *Fitz. N. B.* 459.) It is clear, however, that the writ of intrusion will lie where the demandant claims as a remainder-man; for the authority of *Fitzh. N. B.* 470, is express, that not only he in remainder shall have it, but the assignee of the remainder also. Now this remainder must have been created either by a deed of gift, or by devise; and an intrusion after the death of tenant for life is equally mischievous to him entitled to the remainder, whether it is created by the one mode or the other: even admitting, therefore, that the writ in the register does not apply to the case, we cannot see any impropriety in holding the case to fall within the provision made by the statute of *Westminster* 2, c. 24, that when a writ is

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granted in one case, and a thing happens in *consimili casu*, and needing a similar remedy, a writ should be made accordingly. And the case of *Eastman v. Baker* (a) must be considered as a precedent, the writ being drawn precisely in the same form with the present; for although the objection was never taken, yet it was apparent on the face of the count, and no one on the part of the tenant thought proper to take it. As to the objection on the Statute of Limitations, we are of opinion that the writ of intrusion falls within the statute 32 of Hen. 8, c. 2, and not within the statute 21 Jac. 1, c. 16. The second section of the former statute enumerates writs of entry upon disseisins done to any of his ancestors or predecessors, or any other action possessory upon the possession of any of his ancestors or predecessors, under which latter class of actions the writ of intrusion clearly falls. The statute of Jac. 1, on the other hand, does not apply to cases where the party is reduced to the necessity of bringing his real possessory action, but to cases where he has the right to make an actual entry without action brought, directing all such entries to be made within twenty years next after the right to enter has first accrued; and it is observable that as to writs of *formedos*, the limitation of fifty years, which had been fixed by the same statute of Hen. 8, is reduced to twenty years by an express enactment to that effect in the statute of 21 Jac. 1, the statute being altogether silent as to writs of intrusion, or any other possessory actions. Notwithstanding, therefore, the objections above taken against the count of the demandant, we think it good in law, and that judgment must be given in his favour upon the demurrer to the last plea.

Judgment for demandant on the last plea.

(a) 1 Taunt. 174.

April 19.

### MORRISON and another v. HARMER and another.

In an action for libelling the plaintiffs in their business of selling a medicine, called *Morrison's pills*, by publishing that the defendants had crushed the self-styled *hygeist* system of wholesale poisoning, and that several of the scamps and rascals had been convicted of manslaughter;

CASE against the proprietors of the *Weekly Dispatch* newspaper, for a libel on the plaintiffs, in their business as manufacturers and sellers of certain good, wholesome, and lawful medicines, called *Morrison's Universal Vegetable Pills*, and for publishing that the said medicines were noxious, deleterious, and unwholesome; and for causing it to be believed that the plaintiffs were in bad and insolvent circumstances. The defendants pleaded a justification, as to the following part of the libel: "We may safely claim the merit of having crushed the self-styled hygeist system of wholesale poisoning, since we commenced exposing the homicidal tricks of these impudent and ignorant scamps, who had the audacity to pretend to cure all diseases with one kind of pills, which pills were composed of nothing more or less than *gamboe* and *aloes*. Several of the rot-gut rascals have been convicted of

the defendants pleaded, as a justification, that the pills were composed of *aloes* and *gamboe* of a dangerous and poisonous nature, and that by impudent advertisements, the plaintiffs had pretended that the pills would cure all diseases if taken in sufficient quantities; and that two of the hygeists had been convicted of manslaughter for administering the pills:—*Held*, that the plea was sufficient, although it did not particularly justify the use of the words, *scamps* and *rascals*; also, that it was no objection that one of the patients who had died had taken a less quantity of pills than the hygeist had ordered; and that it was not necessary for the defendants to shew that they had entirely crushed the system.

manslaughter, and fined and imprisoned for killing people with enormous doses of their universal boluses;"—that long before, and at the time of the composing and publishing the said alleged libel, in the introductory part of this plea mentioned, the plaintiffs manufactured, compounded, and sold pills, by them denominated *Morrison's Universal Vegetable Medicines*, at the said building and place, called by them the *British College of Health*, and also during that time styled and denominated themselves and others, who vended and administered the said pills, by the name and denomination of hygeists; that the plaintiffs during all the time aforesaid, and whilst they so manufactured and sold the said pills as aforesaid, were persons wholly ignorant and unskilled in the preparation and compounding of medicines, and utterly unfit to prescribe or administer medicines of any kind; that the said pills so manufactured and sold by the plaintiffs were composed of certain medicinal substances called *gamboge* and *aloes*, both of which said substances were well known to chemists and medical men, and were in common and ordinary use; and one of which, that is to say, gamboge, when unskilfully compounded, was of a highly dangerous and poisonous nature; that the plaintiffs, in order to deceive and delude ignorant and credulous persons, without any sanction or authority whatsoever, appropriated to themselves and used the name and title of hygeists, as denoting themselves to be persons skilled in promoting and preserving health, whilst, in truth and in fact, they, the plaintiffs, were wholly unacquainted with medical knowledge of any kind, and utterly ignorant and unskilled upon the subject; and in like manner, to deceive and delude, denominated and called the said building or place, where they so manufactured and sold the said pills, "*The British College of Health*;" that during all the time aforesaid, the plaintiffs published and dispersed divers false, wicked, fraudulent, and impudent advertisements and handbills; and therein falsely, audaciously, and wickedly stated, asserted, and pretended, that the said pills so manufactured by them, as aforesaid, cured all diseases of every kind; and therein also audaciously and wickedly suggested and recommended, that persons affected with diseases should take great and enormous doses and quantities thereof, and thereby, by such false and fraudulent tricks and devices, contrived and endeavoured to procure and effect the sale of the said pills, and to induce ignorant and credulous persons to purchase the same; that one of the said advertisements and handbills, so published and dispersed by the plaintiffs, contained, amongst other things, the fraudulent, impudent, false, and delusive matters following, of and concerning the said pills, and the said plaintiffs, and the said trade and business carried on by them as aforesaid; that is to say, "Health secured by *Morrison's* pills, the vegetable universal medicine of the *British College of Health*, which has obtained the approbation and recommendation of some thousands, in curing consumption, cholera morbus, inflammations, bilious, and all liver-diseases, gout, rheumatism, lumbago, tic-doloureux, king's evil, and all cutaneous eruptions. Nos. 1 and 2 are both aperient and purgative, and may be used indiscriminately; but experience has proved that No. 2 is the most efficacious in subduing many diseases. These diseases are fevers of all kinds, inflammations, asthma, small-pox, measles, hooping-cough, gout, cholic, in fine, all violent diseases or pain; and when the violence is over, Nos. 1 and 2 should be taken alternately till well, some days in small, and some days in large doses. It is keeping up the evacuations that effectually cures; every bleeding is pernicious, and a

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step towards premature infirmities and the grave. You cannot go wrong with them, by taking them at any time, day or night, or in any number, so innocent is their operation; but experience may point out the following rules, so as to render them more easy and serviceable; as an aperient and to prevent costiveness, the dose is from two to five pills at night or morning; or any time, night or day. Should you feel any uneasiness after two or three days' use, it is a sign your stomach and bowels are foul, and some large brisk doses should be taken so as to get rid of the offending humour, and persevere in that way as a brisk purgative; in either acute or chronic diseases the dose is from eight or ten pills to twenty or more, and, in urgent cases, should be repeated twice a day: night or morning is the most convenient when pursuing a course, otherwise, the best rule is to take them when one feels sickness, fever, or ague coming on; they afterwards require no attention or alteration as to diet, drink, exercise, or cold; the only thing is to continue them till well. During a course, if a patient feels any day not quite so well, let him reflect that he only wants more evacuations, and another dose will relieve him." The plea then averred, that one *Richard Richardson*, being sick, was persuaded and induced by one *Joseph Webb*, he being one of the said self-styled persons called hygeists, to take, and did take, large quantities of the said pills, as suggested and recommended in the said advertisements, as aforesaid; and by reason and in consequence thereof, afterwards died; and that afterwards, at the *York* assizes, the said *Joseph Webb* was indicted and convicted of manslaughter, for killing and slaying the said *R. Richardson*, by so administering, and persuading, and inducing him, to take the said pills, and was sentenced to be imprisoned. Then followed a similar averment of the conviction and imprisonment of one *Robert Salmon*, another of the hygeists, for the manslaughter of one *Mackenzie*, by persuading and inducing him to take the pills. By another plea, the defendants justified the charge of insolvency, which was made in the alleged libel; issue was joined on both pleas.

At the trial, before *Tindal*, C. J., it was in evidence that the defendants, the proprietors of the *Weekly Dispatch* newspaper, had published a series of attacks upon the *hygeian* system; and, by the *Stamp Office* returns, it appeared that at about the period when the libel was published, the quantity of pills sold had considerably diminished. The defendants proved that the pills were composed of *gamboge* and *aloes*, and that a large quantity of them could not be taken without endangering the patient's life. The trials and convictions of *Webb* and *Salmon* for the offence of manslaughter, as stated in the plea, were also proved; but the widow of *Mackenzie* said, that after her husband had been taking many pills, *Salmon* ordered him to take thirty-five more, shortly before he died, but that only twenty-five were administered. The medical witnesses were of opinion that his death would have been accelerated if he had taken the larger quantity.

The plaintiffs called many witnesses, who stated that they had taken immense quantities of the pills, in larger doses than those described by the defendants' witnesses as being sufficient to cause death; without experiencing any but the most favourable results.

The jury found a verdict for the defendants on the first issue, and for the plaintiffs, with 100*l.* damages, on the issue as to the insolvency.

*Kelly* moved for a rule *nisi*, for a new trial upon the first issue, or why judgment should not be entered for the plaintiff, *non obstante veredicto*.—[*Tindal*, C. J. Here there are two issues, one of which has been found for the defendants. Can you move for a new trial upon one issue only? I once looked for an authority upon that point, but could find none.]—Cases have been sent down for a new trial upon one only of several issues; if the court granted a new trial upon both issues, the plaintiffs would run the risk of losing their verdict upon the issue found in their favour. The grounds for the application for a new trial are these:—The libel alleges that the defendants had crushed the self-styled hygeist system, and the plea justifies that part of it; but no proof was offered at the trial to shew that the system had been crushed. It was, indeed, assumed that there had been some previous attacks upon the plaintiffs in former publications; but to support that particular portion of the plea the defendants were bound to shew that they had crushed the system altogether.—[*Tindal*, C. J. There was evidence, that from some cause, the sale of the article had greatly fallen off. Does the allegation in the plea mean more than that they had done their utmost to crush the system? ]—Another objection is, that the part of the plea was not proved which alleged the manslaughter of *Mackenzie*. There was no proof that the medicine was taken by *Mackenzie* in the manner suggested by the advertisements; but, on the contrary, the witness proved that the deceased had taken less than the number of pills ordered by *Salmon*. The plaintiffs are entitled to judgment *non obstante veredicto*, because the defendants do not justify the truth of the whole libel. The libel describes the plaintiffs as being scamps and rascals, which are clearly libellous epithets; but the justification contains no answer to that part of it. It may be taken as a fact that the defendants proved the whole of the justification which they pleaded, but, nevertheless, the plea does not contain an answer to this substantive portion of the declaration.

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*TINDAL*, C. J.—No ground has been laid sufficient to induce the court to send this case down for a new trial. Two objections have been made; first, that there was no proof of the allegation that the defendants had crushed the self-styled hygeist system of wholesale poisoning; and, secondly, that the allegation in the plea as to *Mackenzie's* death, was not only unsupported by the evidence, but was altogether at variance with it. But, it seems to me, upon a fair construction of the allegation, that there was enough proved to enable the jury to come to a conclusion, and therefore we ought not to disurb the verdict. As to the first objection, it was admitted at the trial, that the defendants had attacked the plaintiffs in former publications. The meaning of the statement in the allegation was, that the defendants had done their best to crush the system, not that they had entirely destroyed it. The second objection relates to the taking of the pills by *Mackenzie*. It is alleged, that he was persuaded to take large quantities, as suggested and recommended in the advertisements. The advertisements were in evidence, and the mode of taking the pills there pointed out, was to take care to take enough; perseverance in the use of the medicine is the general strain of the document. It appears that *Mackenzie* had taken a large quantity of the pills, and upon being afterwards directed by *Salmon* to take thirty-five, he took a smaller number. But the medical witnesses proved that if the patient had taken more, he would probably have died sooner. This was evidence for the jury, and if they thought



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that the non-compliance with *Salmon's* directions did not hasten the death of the deceased, they were justified in finding a verdict for the defendants. We will look into the pleadings before we decide upon the other part of the motion.

BOSANQUET, J.—I am of the same opinion. It is said that the defendants were bound to prove that they had crushed the system. The meaning of the statement was, that they had made strong attacks upon it, and it was for the jury to say, whether the diminution in the sale of the article was not to be partly attributed to those attacks. As to the other point, the advertisements recommend that large quantities of the pills should be taken, and it appears that the patient who died took them in large quantities; whether he took thirty-five or twenty-five was immaterial, except that according to the opinion of the witnesses, he would have died the sooner.

COLTMAN, J., concurred.

Rule for a new trial refused.

*Curr. adv. vult.*

TINDAL, C. J.—We have considered the objection raised on the part of the plaintiffs against the form of the defendants' first plea of justification, and we are of opinion, that there is no ground for the motion which has been made for judgment for the plaintiffs, *non obstante veredicto* on that plea. The objection which has been taken is this, that the first plea which proposes to justify the truth of so much of the libel as is set out in its commencement, contains no answer to part, and that, as it is contended, a material part of the libel so set out; inasmuch as the libel, as set out in the plea, applies to the plaintiffs, the opprobrious and scurrilous terms of scamps and rascals, for the application of which terms the plea does not offer any excuse or justification. Now, it must be admitted, that if these terms of invective and reproach contain any ground of charge or imputation against the plaintiffs, substantially distinct in its nature or character from that which forms the main charge or gist of the libel, and the truth of which has been justified by the plea, the consequence above contended for on the part of the plaintiffs would justly follow, for the plea upon that supposition would not contain an answer to so much of the declaration as by the commencement of the plea it expressly undertakes to justify. The main charge against the plaintiffs in the libel is, that they were the compounders and sellers of pills of a poisonous and deleterious nature, and the main and principal allegation in the plea of justification is, that the pills sold by the plaintiffs, when administered and taken in the doses and quantities suggested and recommended by them, were of a highly dangerous, deadly, and poisonous nature, and in the highest degree injurious to the stomachs and bowels of persons using and taking the same. The question therefore is, whether the terms of abuse, which have been above referred to, carry the matter any further than this, the main charge. The words themselves in their vulgar use convey no other meaning than that of general reproach and invective, and we can only discover whether they have any particular meaning in this libel, by referring to the context of the libel, and to the allegations on the record. As to the word "scamp," the plaintiffs themselves have given the meaning

to it, for they allege in their declaration, that it is intended to be applied to them in the way of their aforesaid trade, business, and occupation, that is as vendors of the pills, the making and selling of which by the plaintiffs is the main imputation against them; and the word rascals is associated with an epithet or adjunct, which appears to confine its general abusive quality to a description and designation of the persons who have been occupied in administering the pills spoken of in the libel, of whom two have been convicted of manslaughter. We cannot, therefore, understand these words, however offensive, as containing any charge different and distinct from that of which the truth has been justified in the first plea; and we are not aware of any authority by which it is determined that the justification of the truth of the substantial imputation contained in a libel is not sufficient, unless it extends also to every epithet or term of general abuse, which may be found in the description or statement of such imputation. We think, therefore, the rule which has been applied for to permit the plaintiffs to enter up judgment *non obstante veredicto*, must be refused.

Rule refused.

### TOLSON, demandant, v. WATSON, tenant.

May 6.

THIS was a writ of *formedon*, issued on the 30th of May, 1835, and an appearance was entered upon the 31st of October. On the 28th of April, 1836, the demandant counted, and on the 4th of May the tenant demanded an imparlance to the first four days of *Trinity* Term, which commenced on the 22d of May. On the 25th of May, the tenant took out a summons for further time to plead, and a fortnight's time was obtained, but that being deemed insufficient by the tenant, on the 26th of May he demanded a view. On the 7th of June, the demandant treated the demand of view as a nullity, and issued a writ of *petit cape*; whereupon a rule *nisi* was obtained to set aside the writ of *petit cape*, and to have the view demanded.

The tenant having demanded a view in *formedon* after a general imparlance, the demandant sued out a writ of *grand cape*. Held, that this was irregular, and that the demandant ought to have counter-pleaded or demurred.

*Wilde*, Serjt., and *Manning*, shewed cause against the rule, and *Steven*, Serjt., and *Peacock* were heard in support of it. The arguments sufficiently appear in the judgment of the court.

*Cur. adv. vult.*

TINDAL, C. J.—The question which has been argued before us, arises upon a rule obtained by the tenant, calling upon the demandant to shew cause why a writ of *petit cape*, issued by him, should not be set aside for irregularity, and why the defendant should not have the view; and the irregularity complained of is, that the writ was issued at a time when the tenant was in court, and had demanded a view. The demandant, on the other hand, contends, that the tenant was in no condition to demand a view; first, because the view is not demandable after a general imparlance; secondly, because the view was demanded before the day of appearance given by the imparlance, and consequently at a time when the tenant was not in court. As to the second ground of objection, upon reference to the dates of the proceedings, it appears to be unfounded; for the imparlance was granted on the 4th of May, to *Trinity*

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Term, which began on the 22d of *May*, so that the *quarto die post* would be the 25th, or as the 1st day of the term fell on a *Sunday*, supposing that day to be left out, the *quarto die post* must at latest have been the 26th, on which day the view was demanded. The only objection, therefore, which remains to the regularity of the view is, that it was demanded after a general imparlance; and we must confess that we should have felt ourselves involved in considerable difficulty, if we were called upon in the instance of probably the last writ of *formedon*, which will be brought before us, to decide a point in practice, which seems to have been *versata questio* for near 300 years; as it appears by *Dyer*, fo. 210, b., that when this very point was moved, the court thought one way and the prothonotaries the other, and certainly the subsequent authorities are rather in favour of the opinion of the latter. We feel ourselves, however, relieved from this difficulty by the objection taken by the tenant, namely, that admitting the demand of view cannot be supported, yet the demandant is irregular in suing out the *petit cape*, a writ which can only be awarded where a default has been committed by the tenant, as is manifest from the authorities in *Booth*, tit. Default after Appearance; whereas here there has been no default; and upon reference to the authorities cited on the part of the tenant, we are of opinion, that if the demand of view is objected to upon any ground arising on matter of fact, the demandant should have put in a counter plea; or, if upon any matter of law, he should have demurred, and that the judgment given on a demurrer would not have been peremptory, but an award of the *respondeas ouster* only. The authorities to which we refer are the Year Book, 39 Ed. 3, p. 38.; 7 *Jenkins's Cent.* case 82; *Bro. Abr.* tit. Peremptorie, pl. 76, and *Bro. Abr.* tit. Aide, pl. 118. On the ground, therefore, that the demandant has treated this demand of view as a nullity, and has sued out a writ of *petit cape*, where he ought to have counterpleaded or demurred, we think his proceeding irregular, and that so much of the rule as calls upon us to set aside the writ of *petit cape* for irregularity, must be made absolute.

Rule absolute.

LUCAS v. GODWIN.

May 4.

1. Where a contract stipulated that the plaintiff should be paid for building six cottages, "on the 1st January 1837, on condition of the work being done in a proper and workman-like manner, and to be completed by the 10th of October." *Held*, that after the work was done, and the day of payment had expired, the plaintiff was entitled to recover in *indebitatus assumpsit*, without declaring specially.

ASSUMPSIT for work, labour, and materials. *Plea, non-assumpsit* and issue thereon.

At the trial before *Coltman, J.*, at the last *Huntingdon* assizes, the following were proved to be the facts of the case. The plaintiff was a builder, and the defendant a farmer.

Early in the summer of 1836, the defendant informed the plaintiff that his build some houses upon the credit of his son, evidence was given that the defendant had represented that he and his son were entitled to receive some money from *America*, and that the *Stamford Mercury* contained an advertisement, which required them to go to a certain place to receive the legacy. *Held*, that a copy of the *Stamford Mercury* of a date which corresponded with the time when the representations were made, and which contained such an advertisement, was receivable in evidence.

3. Where a defendant was charged with having been a party to a fraud in making a contract in *June*, evidence of his conduct between that time and *January*, when the money was to be paid, and when his participation in the fraud was first discovered, was held to be admissible.

son, *Thomas Godwin*, who was a carpenter and wheelwright, had been left a legacy; and upon application being made to the plaintiff by *Thomas Godwin*, to build some cottages, the following articles were entered into between them:—

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"Memorandum of an agreement, made this 25th of *June*, 1836, between Mr. *G. Lucas*, builder, on the one part, and Mr. *Thomas Godwin*, of *Fawcett*, in the county of *Huntingdon*, on the other; that is to say, the said *G. Lucas*, agrees to do all the bricklayers, plasterers, and slaters work, (exclusive of slating laths,) and brick floors, in six cottages about to be erected in *Fawcett* aforesaid, of the depth of twenty feet four inches each cottage, breadth thirteen feet outside measure, for the sum of 216*l.*, exclusive of stone foundations, the one-half of which, at the prime cost of the stone, is to be paid for by the aforesaid Mr. *T. Godwin*. Mr. *T. Godwin* also hereby agrees, on his part, to pay unto the aforesaid *G. Lucas*, the above sum of 216*l.*, on the 1st *January*, 1837, on condition of the work being done in a proper and workman-like manner, together with the amount of one-half of the foundations as before mentioned, and to be completed by the 10th of *October*, 1836."

Whilst the houses were building, the defendant frequently viewed the work, and gave trifling orders to the workmen; and expressed his approbation of it after it was completed. About the latter end of *September*, 1836, the defendant asked various persons whether they had seen an advertisement in the *Stamford Mercury*, respecting some property in *America* which had been left to him and his son. A newspaper was produced by one witness, who read over an advertisement, purporting to be inserted by one *Buck*, and the defendant said that he should go to *Spalding* to receive the money therein mentioned, and borrowed a horse of another witness for that purpose. He returned to his house the following day, and said that he and his son had received the money, and deposited it in the *Spalding* Bank. Some extra work was done in the cottages, and they were completed on the 15th of *October*; and in the middle of *December* *Thomas Godwin* was committed to prison on a charge of felony. The plaintiff, upon making inquiries then ascertained that the statement about the legacy, and the *American* property, was a mere fabrication; and he discovered that the land on which the cottages were built belonged to the defendant. The defendant was proved to have admitted that the money was never received at *Spalding*, and that his son was his agent, and in *January* the plaintiff treated him as principal in the contract. To shew that the defendant had been a party in a fraudulent attempt to get credit given to his son, the plaintiff offered in evidence the *Stamford Mercury* newspaper, dated the 23d *September*, which contained the following advertisement:—

"Mr. *Thomas Godwin's* estate.—The administrator of the estate and effects of *Thomas Godwin*, formerly of *Crowlands*, *Lincolnshire*, mariner, on board his majesty's fleet, and late of *Philadelphia, America*, who died on the 5th of *July*, 1836, hereby gives notice that he is about to pay over the sum of 400*l.* to *Samuel Godwin*, late of *Crowlands*, in the county of *Lincoln*, yeoman, and his son, *Thomas Godwin*, formerly apprentice at *Rippingale*, in the said county, wheelwright, who are entitled to 100 acres of land, together with the house, barn, and other buildings thereon, situate at *Philadelphia, America*. If the above claimants will meet at the *White Hart, Spalding*, on the 27th of *September*, between the hours of eleven and two o'clock, they will be entitled to the same, by inquiring of Mr. *W. Buck*, administrator to the deceased."

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It was objected, that this newspaper was inadmissible in evidence, but the learned judge overruled the objection. It was also objected that the plaintiff must be nonsuited, because the contract ought to have been declared upon specially; this point was reserved, and the following questions were left to the jury. First, whether the defendant had authorized his son to make the contract; and, secondly, whether the plaintiff knew when the contract was signed, that the son was agent to his father. The jury returned a verdict for the plaintiff, and found that the defendant authorized the son to contract, and that the plaintiff did not discover that the defendant was a principal, until *January, 1837.*

Kelly obtained a rule *nisi* to enter a nonsuit: or for a new trial on the ground of the reception of the evidence; and also upon affidavits, upon the ground of surprise.

Byles and *Birch* shewed cause. First, this is not a contract upon a condition, and therefore the plaintiff was not bound to declare specially. In *1 Will. Saund.*, 269 (a), it is said, "The general counts may be resorted to in all cases where the contract is executed, and nothing remains to be done but the payment of the money." And in *Bull*, N. P. 139. "For though an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed; yet when that is done it raises a duty for which a general *indebitatus assumpsit* will lie." So where a contract was made to build a house according to a plan, and the condition was broken, but the defendant nevertheless encouraged the plaintiff to proceed with the work, it was held that an action for work and labour might be maintained, *Burn v. Miller* (a). It is true that here the work was to be done by the 10th of *October*, and the money was not to be paid until the 1st of *January*; but it was proved that extra work was done, and the defendant did not shew that the work which was done after the 10th of *October*, was part of the contract work. But, in fact, the contract does not contain any condition at all; the payment of the money was made to depend upon the execution of the work in a proper manner, but that is not such a condition as to require a special declaration, because the law would imply that the work must be so done; and as it was proved that the defendant approved of the work, and promised to pay for it, then there was a waiver of the condition, if it ever existed, as in *Alexander v. Gardner* (b.) But if this objection to the form of the declaration could be sustained, then, upon the facts of this case, the plaintiff would be entitled to recover, without relying upon the contract at all. If goods are found in the possession of a man, he is *prima facie* bound to pay for them; and he cannot set up in answer a fraudulent contract to which he was a party. Thus in *Hill v. Perrott* (c), it was held, that an action would lie for goods, which the defendant had gotten into his possession, and which he had by fraud procured the plaintiff to sell to an insolvent; and in *Biddle v. Levy* (d.), that where goods were supplied to a minor, upon a fraudulent representation of his father that he was about to relinquish his business in favour of his son, the father was held to be responsible in *assumpsit* for goods sold and delivered. As to the admission of the

(a) 4 Taunt. 745.

(b) 1 Bing. N. C. 671. 1 Hodges, 147.

(c) 3 Taunt. 274.

(d) 1 Stark. 20.

newspaper in evidence, it was properly admitted upon two grounds. First, as evidence, of the fact *per se*, that a newspaper with such an advertisement had been circulated in the neighbourhood; and, secondly, upon the ground that the defendant had connected himself with the false representations there made. He was proved to have heard it read by a witness, in his own house; and to have stated afterwards, that in consequence of the information contained in the advertisement, he had been to *Spalding* to receive the money, which he had deposited in the bank.

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Kelly and Gunning, in support of the rule.—It may be admitted that if a contract is executed, and nothing remains to be done but the payment of the money, it is then sufficient to declare on the common counts; but here there was a special condition in the contract, requiring that the work should be done in a proper and workmanlike manner by the 10th of *October*, 1836. If the plaintiff relies upon a dispensation of the condition, then that ought to have been averred in the declaration, that the defendant might traverse it. Then was the newspaper properly received in evidence? The fraud charged by the plaintiff is, that the defendant and his son caused reports to be spread, that they were entitled to certain property, in order to induce the plaintiff to give credit to the son. But the advertisement was inserted in *September*; and the contract was made in the preceding *June*. In a criminal case, evidence shewing a conspiracy in *September*, would not prove a conspiracy in *June*. [*Tindal*, C. J.—It might throw light on the previous conduct of the parties.] And the defendant is proved to have spoken of an advertisement, but not of the particular advertisement which was received in evidence; nor was it proved that he referred to a newspaper which was published on the day of the date of that which was read in evidence. The defendant is said to have heard an advertisement read from a particular newspaper; the regular course would have been, to produce the original newspaper; or if its non-production could be satisfactorily accounted for, then an examined copy might have been produced. Before the 38 Geo. 3, c. 78, it was necessary in an action for libel, to prove the publication of the identical newspaper which contained the libel.

TINDAL, C. J.—I see no reason for disturbing this verdict: Three objections have been made: the first, to the form of the declaration; the second, because of the reception of the evidence; and the last, upon the ground of surprise. Upon referring to the contract, it does not appear to me—inasmuch as the work was perfected and the day of payment had arrived before the action was brought—that the plaintiff was bound to declare specially. The contract was executed. I do not think there was any condition in the contract which went to the whole right of action. *Godwin* agrees to pay the plaintiff, on condition that the work shall be done in a workmanlike manner, but that condition is implied in all contracts. Secondly, it was provided, that the work should be completed on a day certain. But that is no condition; it is rather a mere stipulation that the work shall be completed on that particular day; and if it is not so performed, the defendant may be entitled to recover damages. The second objection is, that the newspaper was improperly received in evidence. It is first said, that the date renders it inadmissible. That is not so. The question was, whether the defendant had

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not entered into a fraudulent contract; and it seems to me that as this was published before the houses were completed, the advertisement may be used to throw light upon the preceding transaction. No rule of law is violated by receiving such evidence, for the purpose of shewing that a conspiracy was in existence between the father and the son. It was for the jury to say what the effect of it was. It is then objected, that it was not shewn by the date of the advertisement, that it had any reference to the conversations and acts of the defendant. The witness stated that the conversation took place in the month of *September*, although he could not remember the precise day; the defendant then said that he was going to *Spalding*, to receive the money from *America*, and asked other witnesses if they had seen the advertisement in the newspaper. Then comes the newspaper, published in the neighbourhood, on the 23d of *September*, containing such an advertisement as that mentioned by the defendant. If there were any other advertisement, to which the defendant really referred, he ought to have proved its existence. Under such circumstances, I know of no reason why this evidence ought not to have been received. The third ground depends upon the affidavits, but they shew no sufficient grounds for granting this motion.

BOSANQUET, J.—I am also of opinion that this rule must be discharged. First, as to the form of the declaration, it was sufficient to frame it in *indubitatus assumpsit*. It is contended that this was a special and conditional contract, and should have been declared on specially. But it is, in fact, a contract executed, although the terms were not strictly complied with. The work was to be completed on the 10th, but was not actually done until the 15th of *October*; but this furnishes no answer, because it does not go to the whole consideration. It is contended that the completion by the 10th of *October*, makes a condition precedent, because the payment is made to depend upon it: but that is not so. It is also said that it is a condition that the work should be performed in a proper and workmanlike manner; but it could not be said that, because some small portion of the work was not so performed, the plaintiff was therefore entitled to receive nothing. Such a breach would only afford the ground to sustain an action for damages, against the party who sustained injury by the non-performance of the contract. Then comes the question as to the admission of the evidence. The real question at the trial was, whether the son was principal or agent in the contract. It is contended that the plaintiff gave the credit to the son in the first instance; and that appears to be the case, for the plaintiff did not discover until *January* that the son was not the principal. It therefore became very important to shew what the conduct of the defendant was, during the whole time that the plaintiff was treating the son as the principal; and upon that ground it appears to me that the evidence of the conduct of the defendant was material. Admitting, then, that such evidence was admissible, was the advertisement properly received in evidence? It seems to me that it was. The defendant had inquired whether an advertisement had been seen respecting his *American* property? It is unnecessary to recapitulate the various remarks made by the defendant upon this subject; it is sufficient to say, that he adverted in the conversations to those particular matters which are mentioned in the advertisement; and then a newspaper was produced, of about the date of the conversations, which tallies so precisely with the statements then made

by the defendant, that no doubt can be entertained but that he had referred to that particular advertisement. It seems to me that this was quite sufficient to make the evidence admissible.

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COLTMAN, J.—With respect to the form of the declaration, if the stipulation for the completion of the work by the 10th of *October* be a condition, it does not go to the whole of the contract. But the ground on which I rest my judgment is this, that it is not a contract with such a condition; and therefore, the work having been executed, the general counts are sufficient. The ground upon which the evidence was received was, that it was admissible to shew a prior conspiracy between the parties, and I know of no rule of law to prevent its admissibility. The objection was also put upon another ground;—that there was no evidence to shew that the advertisement produced, was a copy of that which the defendant had referred to; but the witness spoke to a conversation which had taken place at about the time of the date of the newspaper. Then it is contended that this was but a copy of the newspaper, and that when the defendant spoke of a newspaper, it was with reference to a particular copy of it, and that the original ought to have been produced or accounted for; but the defendant spoke of an advertisement generally, not of a particular copy of the newspaper containing the advertisement. It is as when a person says that he has seen the name of another in the *Gazette*; he is speaking of the advertisement, and not of any particular copy of the *Gazette*.

Rule discharged.

### Cox and others v. KING.

April 28.

THE following case was sent to this court by the Master of the Rolls. *John White Parsons*, late of *West Camell, Somerset*, was, from a period long anterior to, and at the respective times of the passing of the statute and of the execution of the award hereinafter mentioned, seised of an estate in fee simple of several closes, and *inter alia*, of a close of meadow-land, called *Shortlands*, containing by estimation three acres, and four acres and three yards of arable land, lying dispersed at several places in the west field of

By an inclosure act, commissioners were empowered to divide and allot certain open and common fields among the proprietors thereof; and it was

declared that the several fields so to be allotted should be in lieu of and in full satisfaction and compensation of all rights and interests whatsoever, of the persons to whom the allotment was made; and it was declared that it should be lawful for the commissioners to allot and award any new allotments and old enclosures, in exchange for any other new allotments or old enclosures within the same parish, or any adjoining parish; so that such exchanges should be set forth in the award, and that they should be made with the consent of the respective proprietors of the land, to be testified in writing under their hands. A power was reserved to parties aggrieved, to appeal to the quarter sessions. The commissioners by their award, made in 1798, allotted to Sir *H. Mildmay*, in respect of an estate in the parish, two closes of land, late Mr. *Parsons's* land. They also allotted to the said Mr. *Parsons* in respect of his freehold estate, two old enclosures, late Sir *H. Mildmay's*, called *South Stearts*; also one allotment of arable land, called *Shortlands*, late a common field; and the commissioners did thereby consent to, approve of, and confirm the several exchanges made between the said Sir *H. Mildmay* and the said Mr. *Parsons*. It did not appear that any consent in writing was entered into between the parties; but *Parsons* entered into possession of the two closes, called *South Stearts* and *Shortlands*, and after his death, the trustees under his will, contracted in 1813, to sell the same:—*Held*, that the vendors could not, under the award and the act of parliament, make a good title to the purchaser.



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*East Camell.* By stat. 34 G. 3, intituled "An Act for the dividing, allotting, and enclosing, the several open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, in *East Camell*," after reciting that there were situate, within the parish and manor or lordship of *East Camell*, several open and common fields, common meadows, and stinted pasture, called common leaze, and other commonable lands and grounds, containing in the whole by estimation 650 acres, or thereabouts; that Sir Henry Paulett St. John Mildmay, and Dame Jane his wife, in her right, were lord and lady of the said manor or lordship, and that Francis Newman, John Goodford, a minor, Thomas Horner Pearson, clerk, vicar of the the said parish in right of his vicarage, John Barrett, Constantine Crobrow, John White, Abel Willis, Henry Morris, John Hockey, John Lamb Cook, Thomas Carew, and others, were owners and proprietors of all the said open and common fields, common meadows, and other commonable lands and grounds, (except the said stinted pasture); that the said several owners and proprietors were also entitled to rights of common thereon, during certain seasons of the year, and in certain shares and proportions; that the said Sir H. P. St. John Mildmay and Dame Jane, his wife, in her right, were also seised of, or entitled to, the said stinted pasture, called *Camell Leaze*, subject to the right of the said Sir H. P. St. J. Mildmay, and Dame Jane, his wife, and of certain other persons, to stock and stint the same with cattle, during a particular part of the year, and under certain restrictions; that the lands of the said respective owners and proprietors, in the said open and common fields and common meadows, lay intermixed and dispersed in several places distant from each other, and in small parcels, and in that respect were very inconvenient; that the same, and also the stinted pasture and other commonable lands and grounds, in their then present situation were incapable of any considerable improvement, and that it would be very advantageous to the several proprietors thereof, if the said open and common fields, and other commonable lands and grounds, were divided and inclosed, and specific parts and shares thereof allotted unto the said several proprietors, and persons interested in lieu of, and in proportion as near as might be, to their several and respective properties, rights, and interests; it was enacted that it should be lawful for the commissioners therein named, and they were thereby required, to set out, assign, allot, apportion, and divide, the open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, thereby directed to be divided and inclosed in manner following; that is to say, (after certain roads were provided for,) to set out, mark, ascertain, divide, and allot, by proper stakes, metes, and landmarks, all the residue and remainder of the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, thereby directed to be divided and inclosed unto, among, and between the said Sir H. P. St. J. Mildmay, and Dame Jane, his wife, in her right, F. Newman, J. Goodford, T. H. Pearson, J. Barrett, C. Crobrow, J. White, A. Willis, H. Morris, J. Hockey, J. L. Cook, and T. Carew, their respective heirs, successors, and assigns, and all and every other the owners and proprietors of the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, thereby directed to be divided and inclosed, in such quantities, shares, and proportions, and in such parts and places as by the said commissioners should be adjudged and determined to be a just com-

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pensation and satisfaction for, and equal to, their several and respective lands, grounds, rights of common, stints, or cattle-gates, and other their rights and interests therein. Provided always, that the said commissioners should have due regard to the quality, situation, and convenience, as well as the quantity, of the several allotments, to be made by virtue of that act, and also to the situation of the messuages, buildings, and ancient enclosures of the several proprietors to whom such allotments should be made, so as to lay the allotments as convenient and commodious to the said several proprietors as the general partition and exchange of property would in the judgment of the said commissioners admit of; and that the several lands and grounds to be set out and allotted unto and for the person or persons who by virtue of that act should be entitled to the same, should be in lieu of and full satisfaction and compensation of and for his, her, and their several parcels of land, rights of common, stints, cattle-gates, and all other rights and interests whatsoever in and to the said open and common fields, common meadows, stinted pasture, and commonable lands and grounds thereby directed to be divided and enclosed; that when and so soon as the commissioners should have finished the said intended division and allotments of all the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds thereby directed to be divided and enclosed, they should prepare a draft of their award, which should express and specify the number of acres, roods, and perches, in statute measure, contained in the same lands and grounds, and also in the different plots and parcels thereof respectively which should be set out and allotted to each and every person and persons by virtue of that act, with the exact description of the situation, abutments, and boundaries of the same, distinguishing the several tenures thereof; that the said award and all matters and things therein contained, and all such allotments of the said lands and grounds thereby directed to be divided and enclosed as should be set out and allotted by the said award of the said commissioners, should be final, binding, and conclusive to all and every person or persons interested therein, their and every of their heirs, executors, administrators, successors, and assigns respectively. Provided always, that the guardians, husbands, trustees, committees, or attorneys, or persons acting as guardians, trustees, committees, or attorneys, of or for any person or persons being minors, under coverture, lunatics, beyond the seas, or otherwise incapable by law to accept of their respective allotments, might, and they were thereby enabled and required to accept thereof, for the use of such person or persons so incapacitated as aforesaid.

And for the more convenient situation of the several farms, lands, allotments, and estates upon the said division and inclosure, it was enacted that it should be lawful for the said commissioners, and they were thereby authorised and empowered, to assign, set out, allot, and award any messuages, buildings, lands, tenements, hereditaments, new allotments, and old enclosures, within the said parish and manor, *in lieu of or in exchange* for any other messuages, buildings, lands, tenements, hereditaments, new allotments, or old inclosures, within the same parish, or any adjoining parish, township, or place, so that all such exchanges should be ascertained, specified, and set forth in the said award of the said commissioners, or in some deed or deeds to be executed by the commissioners, and enrolled or entered in the same place and manner as the said award, at any time within two years next after the date and execution

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of the said award, and so that such exchanges *should be made by or with the consent* of the respective owners, proprietors, or other persons, seised or possessed of, or interested in the lands or other premises which should respectively be so exchanged as aforesaid, or of the husbands, guardians, trustees, committees, or attorneys, for or on behalf of any such owners, proprietors, or other persons respectively, who should be under coverture, minors, lunatics, or beyond the seas, or under any other disability or incapacity of acting for themselves, *such consent to be testified by writing under their respective hands*, and so that all such exchanges of any messuages, lands, tenements, tithes, or other hereditaments, belonging to the vicarages of *East Camell* aforesaid, or any other ecclesiastical benefice, should be also made with the like consent in writing of the lord bishop of the diocese for the time being; and all exchanges so made should be for ever good, valid, and effectual in law, to all intents and purposes whatsoever, notwithstanding the want of sufficient title in the exchanging parties, or any will, settlement, limitation, or incumbrance affecting the premises which should be so exchanged as aforesaid: proviso, that if any person should think himself aggrieved by any matter or thing done in pursuance of that act, (other than by such orders and things as were thereinbefore declared to be final, binding, or conclusive,) then such person might appeal to any general quarter sessions of the peace for the county, within six calendar months next after the cause of complaint should have arisen.

The said *John White*, in the act named, afterwards assumed the surname of *Parsons*, and was the *John White Parsons* hereinbefore mentioned.

The said commissioners made their award, bearing date the 23d January, 1798, which recited, that the commissioners had made a just and impartial estimate of the respective rights of the owners and proprietors concerned and interested therein, and had deliberately heard, examined, and considered the several allegations made before them at their several meetings, by and on behalf of all parties interested, and had duly informed themselves of the rights and claims of the several proprietors, and of all matters and things relating to the said division and allotment necessary and proper to be weighed and considered, in order to do justice to all parties concerned therein; and had settled, ordered, completed, and finished the divisions and allotments of the said open and common fields, common meadows, stinted pasture, and other commonable lands and grounds, directed by the said act to be divided and allotted, and had caused the said several allotments to be severally admeasured, set out, dug, fenced, planted, and allotted unto and amongst the several owners and proprietors interested therein, in proportion to their several rights, shares, and interests therein, and that in making such allotments due regard was had as well to the qualities, conveniences, and situations, as to the quantities of land contained therein respectively, and also to the situation of the messuages, buildings, and ancient inclosures of the several proprietors to whom such allotments had been made, so as to lay the same as convenient and commodious to the several proprietors as the general partitions and exchange of property would in their judgment admit, and according to the true intent and meaning of the said act. Amongst other things, the award then set out and allotted unto Sir *H. P. St. J. Mildmay* and Dame *Jane*, his wife, for and in respect of an estate in the said parish, rented by the said *Abel Willis*, of the said Sir *H. P. St. J. Mildmay* and Dame *Jane*, his wife, among other lands.

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one close of pasture, called *Ladwell Furse Close*, late Mr. *White Parsons's* land, containing five acres, one rood, and sixteen perches, lettered and numbered in the plan, W. A. 467. It also allotted unto the said Sir *H. P. St. J. Mildmay* and Dame *Jane* his wife, for and in respect of an estate in the said parish, then or lately rented by *W. Canning* of the said Sir *H. P. St. J. Mildmay* and Dame *Jane* his wife, one close of arable land, called *Hill Close*, late said Mr. *White Parsons's*, containing four acres and four perches, lettered and numbered in the plan C. B. 457. It also allotted unto the said *John White Parsons*, in respect of his freehold estate, two allotments of old inclosure, late Sir *H. P. St. J. Mildmay's*, called *South Stearts*, containing sixteen acres one rood and thirty-nine perches, lettered and numbered in the plan W. 464, and 364; also one allotment of arable land, called *Shortlands*, late a common field, containing two acres three roods and twenty perches, lettered and numbered in the plan W. 372. The award proceeded as follows: "And we do hereby consent to, approve of and confirm the several exchanges made between the said Sir *H. P. St. J. Mildmay* and Dame *Jane* his wife, and the said *J. W. Parsons*; and also of all other exchanges made between any of the proprietors and owners of land in the said parish of *East Camell*, the same being in our judgment reasonable and adequate. The award was duly enrolled on the 25th of August, 1814.

There was no evidence of the assent in writing of the said Sir *H. P. St. J. Mildmay* and Dame *Jane* his wife, or either of them, or of *J. W. Parsons*, to any exchange, save as such assent might be inferred from the award itself. The said *J. W. Parsons* entered into the possession or receipt of the rents and profits of the additional two acres, three roods, and twenty perches of land, called *Shortlands*, and the said sixteen acres one rood, and thirty-nine perches of land, called the *Stearts*, immediately after the said award, and continued in possession thereof until the time of his death. The said *J. W. Parsons*, on the 23d of September, 1808, by his will, devised all his real property to trustees in trust to sell the same for the payment of debts and charges, and died shortly afterwards, leaving *H. W. Parsons* his heir at law. The trustees proved the will on the 17th of May, 1809, and entered into the possession or receipt of the rents and profits of all the said lands, called *Shortlands* and the *Stearts*, and ever since continued and still were in such possession. In pursuance of an order of the Court of Chancery, the master, on the 7th of April, 1813, offered for sale by public auction certain lands of the said *J. W. Parsons*, in five lots, and among them, in lot one, the said close of arable land, called *Shortlands*, containing by estimation six acres, more or less; and the said two closes of pasture land, called the *Stearts*, containing, by estimation, sixteen acres, more or less, and *William Leonard Thomas Pyle Taunton*, Esq., became the purchaser of the said lot one. By an order of the Court of Chancery, dated the 23d February, 1819, it was referred to the master, to inquire whether the plaintiffs in the cause could make a good title to the said premises so purchased by Mr. *Taunton*. The master, by his report made in this cause, bearing date the 7th of May, 1835, in pursuance of the said order of the 23d February, 1819, certified that he was of opinion, that the plaintiffs could make a good title to the premises.

Mr. *Taunton* objected to the report, because as to two pieces of land, part of the lands comprised in the purchase and particulars of sale described as two

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closes of pasture land, called the *Stearts*, no title was adduced except under the award of the said commissioners, made within sixteen years next before the purchase. That no power was given to the commissioners by the said act to allot or award any old inclosure to any person in respect of any freehold estate he might have had in the said parish, but only in lieu of or in exchange for some other messuages, buildings, lands, tenements, hereditaments, new allotments, or old inclosures, within the said parish, or some adjoining parish, township, or place; that by the said act it was expressly provided, that all such exchanges should be ascertained and set forth in the award of the commissioners, or in some deed or deeds to be executed by the commissioners, and enrolled or entered in the same place and manner as the said award; that by the said act it was also expressly provided, that all such exchanges should be made with the consent of the respective owners, proprietors, or other persons seised or possessed of, or interested in the lands or other premises which should respectively be so exchanged, or of the husbands, &c. for or on behalf of any such owners, proprietors, or persons who were under coverture, &c.; and that such consent should be testified by writing under their respective hands; that it did not appear that any exchange in respect of the said two allotments of enclosure, called the *Stearts*, was made or intended by the said commissioners in or by the said award, or that any such exchange was ascertained, specified, or set forth therein, or in any deed or deeds executed by the said commissioners, enrolled, or entered in the same place and manner as the said award, at any time within two years next after the date and execution of the said award, as required by the said act as aforesaid; that it did not appear that any messuages, buildings, lands, tenements, hereditaments, new allotments, or old enclosures, within the said parish and manor of *East Camell*, were assigned, set out, allotted, or awarded, in lieu of or in exchange for the said two allotments of old enclosures, called the *Stearts*; nor did it appear that any such consent of the respective owners, proprietors, or other persons seised or possessed of, or interested in the lands or other premises which might be alleged to have been so respectively exchanged or intended to be exchanged as aforesaid, or of any such husbands, &c. as was required by the said act, was at any time given or testified in writing, under the hand of Sir *H. P. St. J. Mildmay*, to whom the said two allotments were stated to have belonged, or under the respective hands of the respective owners, proprietors, or other persons, seised or possessed of, or interested in the lands or other premises which might be alleged to have been respectively so exchanged as aforesaid, or of any such husbands, &c.

The question for the opinion of the Court was, whether the vendors could, under the award of the commissioners and the act of parliament, make a good title to the said closes, pieces, or parcels of land, called the *Stearts* and *Short-lands*.

*Wilde*, Serjt., on behalf of the purchaser, relied upon the same objections as were raised in the objection to the report. He cited *Casamajor v. Strode* (a). *Bailiffs of Godmanchester v. Phillips* (b), *Wingfield v. Thorpe* (c).

(a) Mylne and Keene, 706.  
(b) 5 B. & Ado., 198.

(c) 10 B. & Cress., 785.

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*Willcock, contra.*—By the provisions of the statute, the commissioners had power to deal with the old as well as the new enclosures, for the purpose of making a more advantageous distribution. The question is, whether it must not be presumed, that the commissioners took care that the necessary consent should be given when the exchanges were made. The statute required that exchanges should be made by the consent of both parties; and the approbation of all exchanges, which is expressed by the commissioners in their award, shews that such mutual consent had existed. *Shortlands* was a common field, and it must be taken *reddendo singula singulis*; that *Shortlands* was allotted in respect of the rights of common, and the *Stearts* in respect of the exchanges. There was no appeal against the award; and the Court will not presume that the commissioners have not done their duty. In *The King v. the Inhabitants of Haslingfield* (d), Lord *Ellenborough*, C. J., said, “The general rule is that where a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shewn.” Such was also the principle which governed the decision in *Williams v. East India Company* (e).

*Wilde*, Serjt., in reply.—The statute must be looked at, with reference to reversionary interests of other parties, besides those who might be living when the award was made. It does not appear what land is given in exchange for the *Stearts*. As no title can be made to the lands in question, except under the award, the Court will require that the award should appear to be made in pursuance of the powers with which the commissioners were invested.

Cur. adv. vult.

The following certificate was sent to the master of the rolls after *Trinity* Term :—

“This case has been argued before us by counsel: we have considered it, and are of opinion, that the vendors cannot, under the said award of the commissioners and the said act of parliament, make a good title to the said closes, pieces, or parcels of land, called the *Stearts* and *Shortlands*.

N. C. TINDAL.

J. A. PARK.

J. B. BOSANQUET.

T. COLTMAN.”

(d) 2 M. &amp; Sel. 561.

(e) 3 East, 192.

May 1.

## YOUNG v. COLE.

The plaintiff, who was a stockbroker, sold for the defendant four *Guatemala* bonds, and paid him 298*l.*, the price for which they were sold. The vendee discovered, after two days, that the bonds were not stamped so as to make them saleable at the Stock Exchange; and he thereupon returned them to the plaintiff, who repaid the purchase-money, without conferring with the defendant. The plaintiff did not disclose the defendant's name when he sold the bonds, and it appeared that stockbrokers were treated as principals, and were liable to be expelled from the Exchange, if they failed in performing their contracts:—*Held*, that the plaintiff was authorized to rescind the contract, and that an action for money had and received was sustainable by the plaintiff, to recover back the 298*l.*, without declaring upon an implied warranty by the defendant, that the bonds were saleable.

**A**SSUMPSIT for work and labour as a broker, and for money paid, money had and received, and on an account stated. *Plea*—Non-assumpsit. At the trial before *Tindal*, C. J. at *Guildhall*, at the sittings after *Michaelmas* Term, the following facts were in evidence:—

The plaintiff was a broker on the Stock Exchange, and on the 26th of *April*, 1836, the defendant requested him to sell on his account four *Guatemala* bonds for 250*l.* each, and a sale having been effected to one *Briant* at 30 per cent., the defendant delivered the bonds to the plaintiff, and received a check for 298*l.* 15*s.* The following memorandum was signed by the plaintiff:—

Sold for *T. H. Cole*, Esq.

|                                         |      |    |   |
|-----------------------------------------|------|----|---|
| 1000 <i>Guatemala</i> bonds, at 30..... | £300 | 0  | 0 |
| Commission .....                        | 1    | 5  | 0 |
|                                         | 298  | 15 | 0 |

On the 29th of *April*, *Briant* returned the bonds to the plaintiff, upon the ground that they were unsaleable and good for nothing, by reason of their not having been stamped by the *Guatemala* government; and the plaintiff, after making inquiries as to the validity of the objection, repaid *Briant* the money which he had paid for the bonds, without conferring with the defendant before he rescinded the contract. The bonds were issued by the *Guatemala* government in 1826, and in 1829 an advertisement was inserted in the *London* newspapers, requiring the holders of the bonds to produce them to an agent of that government to have another stamp affixed; since that period, by the course of dealing on the Stock Exchange, all bonds which were sold had been stamped in pursuance of this notification. Inquiries were made, for the purpose of ascertaining if there was any agent of the *Guatemala* government in this country, who would affix the stamp to the bonds in question, but no agent could be found.

The practice on the Stock Exchange was proved to be, that if a broker contracted to sell an article of a particular description, and failed to do so, the contractee was entitled to recover back the amount from the broker; and if he made default in paying the money, he was liable to be expelled from the Exchange.

Before the sale of the bonds to *Briant*, the plaintiff and the defendant were both ignorant that an additional stamp was necessary to make the bonds marketable; and the plaintiff did not disclose the name of his principal when he sold the bonds to *Briant*. The defendant refused to return the 298*l.* 15*s.* to the plaintiff, but said in a letter which was in evidence, that if the bonds had belonged to him, he would have returned the money; but it did not appear that the bonds did not belong to him. The plaintiff, thereupon, brought this action.

It was objected, that the declaration was insufficient, inasmuch as it should have been drawn specially, on the implied warranty by the defendant, that the bonds were marketable; also, that the plaintiff was not entitled to rescind the

contract with *Briant* until he had first communicated the facts to the defendant. The jury found a verdict for the plaintiff.

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Sir *F. Pollock*, in pursuance of leave reserved, obtained a rule *nisi* to enter a nonsuit upon the above grounds.

*Wilde*, Serjt., and *Ogle* shewed cause.—In *Child v. Morley* (a), it was held that a broker, who contracted with others for the sale of stock at a future day, by the authority of his principal, who afterwards refused to make good the bargain, could not, by paying the difference to such third person, maintain an action on an implied assumpsit against his principal for the amount; but Lord *Kenyon*, C. J., said, “that if the plaintiff had been bound as guarantee for the defendant, to the purchasers of the stock, there could have been no doubt but that he might have recovered his whole demand.” In the present case, it was proved that the plaintiff would have been expelled from the Stock Exchange, if he had not returned the money which he had been paid. In such a case, when a demand is rightfully made upon a broker, he is bound to comply with it, without waiting to communicate with his principal. This is not a case of a voluntary payment, but the plaintiff was under a responsibility and compelled to pay the money. The bonds, in the state in which they were, were mere waste paper, and altogether worthless. This is one of a class of cases in which the courts have considered the article sold, as being of no value whatever; and therefore there was a total failure of consideration. *Bridge v. Wain* (b), *Jones v. Ryde* (c). In *Lucas v. Worswick* (d), it was held that money paid by the plaintiff, through forgetfulness of facts within his knowledge, could be recovered; which is stronger than the present case, because the plaintiff was not bound to know that a stamp was necessary. In *Street v. Blay* (e), which might be relied upon, the article which was sold was of some value. There are several cases where parties placed in circumstances of responsibility have been held to be entitled to recover back money which they had paid, *Austen v. Ward* (f), *Wilson v. Milner* (g), *Fisher v. Fallowes* (h).

*Robinson*, *contrà*.—It did not appear that the bonds were not binding on the state which issued them, notwithstanding a stamp was not affixed in pursuance of the advertisement. They were not, therefore, entirely worthless. It was merely proved that they were not saleable on the Stock Exchange. The plaintiff ought to have given notice of the objection to the defendant before he rescinded the contract, to give the latter an opportunity of endeavouring to have the stamp affixed. Nor could *Briant* have insisted on having the money returned, as he saw the bonds when he purchased them, and no fraud was imputed to the seller. And as the bonds were of some value, the action ought to have been brought upon the implied warranty that they were saleable. This is not a case where there was a total failure in the consideration, as in some of the cases cited; or where the party was compelled to pay over money, as in the cases relating to bailiffs and sheriffs. In *Street v.*

(a) 8 T. R. 610.

(b) 1 Stark. N. P. C. 504.

(c) 5 Taunt. 488.

(d) 1 Moo. & Robinson, 263.

(e) 2 B. & Adol. 456.

(f) 1 Ry. & Moody, 116.

(g) 2 Camp. 452.

(h) 5 Esp. 171.



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*Blay* (i), in speaking of the right of a vendee to rescind a contract altogether by returning an article to the vendor, Lord *Tenterden*, C. J., says, "It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revert the property in the vendor, and recover the price as money paid on a consideration which has failed; but must sue upon the warranty, unless there has been a condition in the contract, authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud which destroys the contract altogether." And the same rule is recognized in *Gompertz v. Denton* (k), 1 Wills. Saund. 269, b., *Patteshall v. Tranter* (l). Therefore the form of this action is misconceived. In *Parkinson v. Lee* (m), it was held, that upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the same, the law does not raise an implied warranty that the commodity should be merchantable; and, therefore, if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part, such seller is not answerable though the goods turned out to be unmerchantable.

TINDAL, C. J.—It appears to me that this was properly considered as money received to the plaintiff's use. When the plaintiff delivered the 298*l.* to the defendant, it was his own money, and he was liable to *Briant* as a principal. It was delivered upon a certain understood state of facts, namely, that the securities were, *bond fide*, *Guatemala bonds*, and upon the faith and in consideration that they were properly stamped and saleable in the market. But it seems to me that the consideration has failed, as completely, as if the defendant had contracted to deliver gold coin to the plaintiff, and had afterwards handed over the same quantity of tokens. It is not a question of warranty; but it is the case of a delivery of a thing which is of no value whatever. The only question is, therefore, whether, after the plaintiff had made a contract with a third party, he could subsequently rescind it without giving notice to the defendant. Now there was no contract between the defendant and *Briant*: if the bonds had not been delivered in pursuance of the contract, an action for the non-delivery would have been brought against the plaintiff in this action, and not against the defendant, whose name was never disclosed as a principal. That would be so, if the case rested there; but it was also proved to be the universal practice at the Stock Exchange, to make the broker liable upon all contracts, and that would entitle him to rescind the contract afterwards, without consulting his principal. The defendant could not suffer, because, if any thing were done improperly, it would *pro tanto* afford a defence to any action similar to the present, which might be brought by the broker. There is another ground upon which the plaintiff is entitled to recover. It appears that, after the transaction, the defendant observed, in a letter to the plaintiff, "If these bonds were my own, you should be repaid the money, but they belong to another person." By this he put his own seal upon the transaction.

(i) 2 B. & Ado. 461.  
 (k) 1 Cr. & M. 209.

(l) 1 Har. & Wol. 178.  
 (m) 2 East, 314.

and ratified every thing which the plaintiff had done, for he did not prove that the bonds were not his own. The rule must be discharged.

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COLE.

PARK, J., concurred.

BOSANQUET, J.—I am of the same opinion. I agree with the cases which have been cited; but this is not a breach of a warranty, but a case where no consideration was given for the money which was paid. The bonds turned out to be but useless paper. Then, was this a voluntary payment made by *Young to Briant*? In *Child v. Morley* (n), it did not appear that the broker was under that sort of compulsion, which entitled him to call upon his principal to reimburse him after he had rescinded the contract; but here it was proved that, by the regulations of the Stock Exchange, the plaintiff would have been liable to be expelled if he had not returned the money, and that the broker is treated as a principal in the transaction. As between him and his principal he was still an agent, and was entitled to call upon the latter, for the money which he repaid when he rescinded the contract; and it appears to me that the declaration is sufficient. The defendant has also acknowledged his liability in the letter which he wrote to the plaintiff.

COLTMAN, J.—The first question in this case which we have to consider, is whether the plaintiff could rescind the contract, and I think it is clear that he could do so. It was understood between the parties when the contract was made, that *Guatemala* bonds, as known in the market, should be delivered. The only remaining question is, whether, as the plaintiff was only agent to the defendant, it was necessary that he should communicate with him before he rescinded the contract? I am of opinion that it was not. When the defendant gave the plaintiff authority to go to the Stock Exchange to sell the bonds, he also gave him an authority to rescind the contract.

Rule discharged.

(\*) 8 T. R. 610.

### VESTRIS'S Bail.

April 21.

**A**RCHBOLD opposed the justification of the bail; and objected, that the defendant had previously given notice to justify bail, who were rejected by the judge; and now attempted to justify other bail, without having obtained the leave of a judge, in pursuance of R. T. 1 W. 4, reg. 1, s. 5, which directs "that the bail, of whom notice shall be given, shall not be changed without leave of a judge." It has been held, that this rule applies to bail put in by the sheriff, *Rex v. The Sheriff of Essex* (a); and to bail for prisoners in custody, *Stroud v. Kenny* (b).

The rule Trin. 1 W. 4, s. 5, which requires that bail shall not be changed without the leave of a judge, applies to cases where other bail justify, in consequence of the rejection of the first bail.

**Wightman.**—The rule is only applicable where the bail has been changed, and not where they were rejected after having duly appeared to justify. The

(a) 4 M. & Scott, 247; 2 Dowl. P. C. 782.

(b) *Jervis*, New Rules, 3d ed.

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parties here had notice that these bail would justify, and therefore there can be no surprise. [*Bosanquet, J.*—The rule was intended to prevent the practice of putting in sham bail in the first instance.] Here the bail were rejected, not because they were insufficient, but because they had been indemnified. The effect of holding that leave is required in this case, would be to inconvenience the sheriff in putting in other bail.

The Court allowed the case to stand over, until the practice of the other Courts was ascertained.

**TINDAL, C. J.**—We find that in both the other courts, after bail is rejected, the leave of a judge to change the bail is required. The bail must, therefore, be rejected.

**BOSANQUET, J., and COLTMAN, J., concurred.**

Bail rejected.

April 27.

### Experte RICE.

A charge by an attorney for searching for an old judgment, and advising his client as to the propriety of reviving it, is not a taxable item, under 2 Geo. 2, c. 23.

**F. V. LEE**, moved that an attorney's bill of costs might be referred for taxation, upon the usual terms. The only item which rendered the bill taxable, was a charge made by the attorney for searching for an old judgment in this court, and advising his client upon the propriety of reviving it. In *Sandom v. Bourne (a)*, it was held, that a charge for preparing a warrant of attorney, rendered the bill liable to taxation. So a charge for attending a party, to advise him on an action which had been brought against him. *Smith v. Taylor (b)*.

**TINDAL, C. J.**—The item in this bill is one degree removed from any of those which have been held to render a bill taxable.

**PARK, J., and COLTMAN, J., concurred.**

Rule refused (c).

(a) 4 Camp. 68.

(b) 7 Bing. 259.

(c) In *Experte Bowles*, 1 Hodges, 143; charges for searching the *Warrant of Attorney Office*, and in *Pepper v. Yeatman*,

2 Har. & Woll. 116, for advising a client as to an execution on a judgment obtained against him, were held not to render the bill taxable. And see *Experte Branson*, post, 132.

May 6.

### HOLLIDAY v. LAWES.

Interlocutory costs payable to a plaintiff, may be set off, under *Hil. T.* 2 W. 4, 93, against the costs of a judgment of *non pros.* in the same suit, without being subject to the defendant's attorney's lien.

**IN Hilary term**, a rule was obtained by the plaintiff, calling on the defendant to shew cause, why the bail-bond should not be cancelled; which rule was discharged with costs, taxed at 15*l.*, on the 4th of *February*. On the 21st of *February*, the defendant was declared a bankrupt, and on the 10th *March*, the

defendant's attorney entered a judgment of *non pros.*, because the plaintiff did not proceed with the action, and on this judgment the costs were taxed at 9l.

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*Atcherley*, Serjt., obtained a rule *nisi*, calling upon the defendant and his attorney, to shew cause why the plaintiff should not be at liberty to set off the costs taxed in his favour on the 4th *February*, against the costs of the judgment of *non pros.*; without reference to the lien which the defendant's attorney claimed to have upon the costs of the judgment.

*Wilde*, Serjt., shewed cause.—This question depends upon the rule Hil. T. 2 W. 4, 93, which directs, “that no set-off of damages or costs between parties, shall be allowed to the prejudice of the attorney's lien for costs, in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.” The meaning of this is, that interlocutory costs, may be set off against interlocutory costs in the same suit, without prejudice to the attorney's lien. Here it is sought to set off the plaintiff's interlocutory costs, against final costs on a judgment obtained by the defendant. *Doe d. Hope v. Carter* (d), is an authority in favour of the defendant. [*Bosanquet*, J.—In that case the costs were probably incurred before the rule of court came into operation.] The case was decided in *Easter Term*, after the rule came into operation.

*Atcherley*, Serjt., *contrà*, was stopped.

TINDAL, C. J.—If a plaintiff recovered final judgment, and was liable to interlocutory costs in the suit, the plaintiff's attorney's lien would only extend to the balance payable to the plaintiff; so in this case, the claim of set-off ought to be allowed. It seems to come precisely within the rule.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

(d) 1 Dow. P. C. 269.

## WILLIAMS V. GESSEY.


April 19.

TROVER to recover a box containing wearing apparel. *Plea*—Not guilty.

At the trial, before *Bolland*, B., at the last *Oxford* assizes, it was in evidence, that the defendant kept the *Star and Garter* inn, at *Oxford*, and that carriers were accustomed to call there for such parcels as were left to be forwarded; but nothing was received, by the defendant, from the parties who left the parcels. The box of wearing apparel was taken to the *Star and Garter*, directed to a person at *Wichenford*, and the defendant was informed that it was to be left at the inn until the plaintiff called for it. A few hours afterwards, the plaintiff inquired for the box, but it could not be found; and the defendant's wife said, in her husband's presence, that she had no doubt but that he had sent it away by *Croft*, the carrier, by mistake. It was objected, or the defendant, that there was no evidence of a conversion; and the learned judge being of that opinion, the plaintiff was nonsuited (e).

Where a box was given to an innkeeper to be kept until it was called for, and when inquiry was made for it, the innkeeper's wife said, she supposed some of the carriers had taken it away by mistake:—*Held*, that this was no evidence of a conversion, and that trover could not be maintained.

(e) See *Williams v. Gessey*, 7 Car. & P. 777.

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*F. V. Lee* moved to set aside the nonsuit, and contended that there was evidence for the jury of a conversion by the defendant. The directions given were, that the box would be called for by the plaintiff; but the statement made by the wife, shewed that the defendant had forwarded it by the carrier. In effect, it amounted to such a demand and refusal as would entitle the jury to find that there was a wrongful conversion.

TINDAL, C. J.—It turned out that the statement made by the defendant's wife was incorrect, and that the defendant had not forwarded the box by the carrier. There was nothing to go to the jury; in all probability the box was stolen (*f*). Although the defendant might have been guilty of negligence, this form of action cannot be supported.

BOSANQUET, J., and COLTMAN J., concurred.

Rule refused (*g*).

(*f*) In trover against a carrier, a refusal to deliver is not evidence of a conversion, if it appears clearly, that the goods have been lost through negligence. *Anon.* Salk. 655; *Ross v. Johnson*, 5 Burr. 2825; *Owen v. Lewis*, 1 Vent. 223; *Hickman v. Hargreaves*, 1 Sel. N. P. 419, 8th ed.

(*g*) In another action, at the same assizes, a verdict was found for the plaintiff, under circumstances similar to the above; but in Easter Term, a rule nisi, which had been obtained by *Ludlow*, Serjt., to enter a nonsuit, was made absolute. *Coram Tindal, C. J., Park, J., Vaughan, J., and Coltman, J.*

May 8.

Ex parte BRANSON.

Charges in an attorney's bill for drawing and enrolling the certificate of an acknowledgment, made by a married woman, and for fees paid on enrollment, under the Fines and Recoveries' Act, (3 & 4 W. 4, c. 74,) do not render the bill taxable within 2 Geo. 2, c. 23.

HOGGINS obtained a rule nisi, to refer an attorney's bill for taxation on the usual terms. The alleged taxable items were the following charges for business incurred under 3 & 4 W. 4, c. 74, (Abolition of Fines and Recoveries' Act.) "Drawing and engrossing affidavit verifying the certificate of taking acknowledgment—enrolling and office copy of certificate—attending to bespeak office copy of acknowledgment"—paid for the same—*Fears v. Wilson* (*l*), *Luxmore v. Lethbridge* (*m*), and *Smith v. Wattleworth* (*n*), were cited. The attorney was not an attorney of this court.

*Wilde*, Serjt., shewed cause.—It is difficult to understand how it can be contended that this bill is subject to taxation. By 2 Geo. 2, c. 23, it appears that a bill must contain "fees, charges, or disbursements, at law or in equity," to render it liable to be taxed. Under the old proceeding by fine and recovery, there was a supposed cause in court, but now the proceeding amounts to a mere conveyance.

*Hoggins*, in support of the rule.—By sec. 89, 3 & 4 W. 4, c. 74, the Lord Chief Justice is authorized to make orders respecting the fees, which shall be payable for the proceedings required to be done by that act; and sect. 85, directs, that the certificate and affidavit shall be filed of record in the court. The Courts have always endeavoured to extend the operation of the 2 Geo. 2,

(*l*) 6 B. & Cress. 86.

(*m*) 5 B. & Ald. 398.

(*n*) 4 B. & Cress. 464.

c. 23, for the better protection of suitors. In *Winter v. Payne* (o), it was held, that the following items made a bill taxable, although the suit was not prosecuted, and no writ was issued:—"attending and taking instructions to commence an action; drawing and engrossing affidavit of debt and duty; attending you to get sworn thereto, and paid for oath;" and the Court said, "that the charges for making the affidavit and for swearing, were for proceedings in the court, as the oath must either be administered by the Court itself, or by some authority delegated by the Court; and that the act of parliament being beneficial to the subject, ought to receive a liberal construction." In *Smith v. Wattleworth* (p), it was decided, that an agent appointed to practise in the Insolvent Debtors' Court, is subject to have his bill taxed, under the provisions of the 2 Geo. 2, c. 23.

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TINDAL, C. J.—This rule must be discharged. The stat. 3 Jac. 1, c. 7, required, that "all attorneys and solicitors shall give a true bill unto their masters or clients, of all the charges concerning the suits which they have for them, subscribed with their hands and names, before such time as they shall charge their clients with any the same fees or charges." Then the 2 Geo. 2, c. 23, sec. 23, enacts, "that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity," until a bill has been delivered, which is made subject to taxation. Both these statutes appear to me to have reference to fees, charges, and disbursements in the course of a suit; and the Court went very far in extending the operation of the statute, to a charge for a writ of *dedimus protestatam* (q). The title of the 3 & 4 W. 4, c. 74, is, "An Act for the abolition of Fines and Recoveries, and for the substitution of more simple modes of assurance." An assurance, means a conveyance, and although certain steps are required to be taken in the court, they cannot in any way be considered as proceedings in a suit.

PARK, J.—The stat. 2 Geo. 2, c. 23, which is highly beneficial to suitors, has been carried to its utmost limits; but the charges in this bill have no reference to any suit at law or in equity.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged (r).

(o) 6 T. R. 645.

(p) 4 B. & Cres. 364.

(q) *Ex parte Prickett*, 1 New Rep. 266.

(r) See *Ex parte Bowles*, 1 Hodges, 143, and *Ex parte Rice*, ante, 130.

CLARK, Assignee of the Sheriff of Middlesex v. VESTRIS.

April 22.

A RULE *nisi* was obtained on the 19th April, calling upon the plaintiff to shew cause why the proceedings on the bail bond in this cause, should not be set aside on payment of costs. It appeared that the defendant was taken an assignment of the bail bond, and the bail gave notice that the plaintiff was at liberty to proceed with the trial of the cause; and the bail was afterwards perfected in time to try at the second sittings in the Term, provided the defendant accepted short notice of trial:—*Held*, that the bail bond ought not to stand as a security, under R. H. T. 2 W. 4, V.

Where a defendant pleaded an issuable plea, after the plaintiff had

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arrested on the 28th *March*, and on the 6th of *April*, notice of justifying bail on the 8th, was given; but the bail did not justify. On the 5th *April*, the plaintiff declared in the action, *de bene esse: Venue, London*; and on the 6th gave a rule to plead; on the 8th *April*, he took an assignment of the bail bond. The bail finally justified on the 19th *April*. The first sittings in this term, for *London*, were on the 21st *April*, and the second sittings on the 28th. It appeared, by affidavit, that the defendant pleaded non-assumpsit and a set-off, on the 17th *April*; and that the bail gave notice to the plaintiff, that he was at liberty to proceed in the action, without prejudice to his right of proceeding on the bail bond.

*Busby* shewed cause.—The bail bond must stand as a security; because the plaintiff has lost a trial within the meaning of rule *Hil. T. 2 W. 4. V.*, which orders, “that upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail bond on perfecting bail above, the attachment or bail bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial in a town cause, in the term next after that in which the writ is returnable, and in a country cause at the ensuing assizes.” As the rule to plead was given on the 6th *April*, the plaintiff would have had sufficient time to give notice of trial for the first sittings in the term. By taking an assignment of the bail bond, after the default in justifying bail in due time, the plaintiff’s proceedings in the original action were stayed. *Tidd’s Practice*, 9th ed. 300. Therefore, it is evident that the plaintiff lost a trial at the first sittings. If it were established that, by giving a notice, the bail may compel the plaintiff to proceed in both actions at once, the rule would be rendered nugatory. The plaintiff is also too late to give eight days’ notice of trial for the second sittings in the term. [*Tindal*, C. J.—How are you prevented from going to trial, if the defendant takes short notice of trial? A defendant is generally put under the strictest terms when he asks a favour of the Court.] It may be inconvenient to the plaintiff to give short notice of trial.

*Henderson, contrà*.—After the defendant had pleaded an issuable plea on the 17th *April*, the plaintiff might have proceeded to trial at the first sittings in the term; and the notice given by the bail would have estopped them. from taking any advantage on the ground that the proceedings were stayed by the assignment of the bail bond. It ought to appear, that the plaintiff had lost a trial, at the time the rule *nisi*, to stay the proceedings, was obtained by the defendant. *Stride v. Hill* (s). Secondly, the plaintiff is now in time to go to trial at the second sittings in the term, provided that the defendant accepts short notice of trial, which he is willing to do. Therefore, the plaintiff has not been prevented from going to trial in the term, within the meaning of the rule (t).

*TINDAL*, C. J.—The plaintiff might have proceeded to trial, if he had been desirous of doing so; the defendant was completely in court on the 19th *April*, and although the plaintiff contends that, by taking an assignment

(s) 1 Gale, 431.

(t) See the *King v. The Sheriff of Shropshire*, 2 Har. & Woll. 319.

of the bail bond, the proceedings in the original action were stayed, still, under the circumstances of this case, as the defendant had pleaded, and the bail had consented that the action might proceed, the bail bond ought not to stand as a security. I think this rule must be made absolute, upon payment of the plaintiff's costs; the defendant undertaking to take short notice of trial for the second sittings.

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BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

### Exparte DU FAUR.

May 6.

A RULE nisi had been obtained, calling upon Mr. *Du Faur*, an attorney of this court, to give up certain deeds and papers to Mr. *Simpson*, administrator, *pendente lite*, of the estate of Mr. *Day*. It appeared that *Day* had, for many years, employed Mr. *Du Faur*, as his attorney, in which capacity the deeds and papers in question, had been deposited with him. *Day* executed a will and codicils, in which he had appointed certain executors; and the validity of these instruments was now in litigation in the Ecclesiastical Court; it also appeared that *Du Faur* claimed to be entitled to a legacy, under one of the codicils.

An administrator appointed *pendente lite*, is entitled to call upon the late attorney of the deceased, to deliver up deeds and papers belonging to the deceased, which are in his possession.

*Talfourd*, Serjt., and *R. V. Richards*, shewed cause.—This is not an ordinary application. The attorney is interested in the result of the proceedings which are now pending; and it may ultimately turn out, that the executors under the will, are entitled to the possession of these documents.

*Wilde*, Serjt., *contra*, was stopped.

TINDAL, C. J.—I see no difficulty in making this rule absolute, as these deeds ought to be given up, the attorney being first paid the bill of costs due to him from the testator. The rights of an administrator, *pendente lite*, are considered in *Woollaston v. Walker* (u); and it appears that such an administrator has the same powers as one appointed during a minority; and the reason given is, that it would be very inconvenient, if no body could call in the effects pending the dispute, which often lasts many years. I cannot see how the party can be injured.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

(u) 2 Strange, 918.



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DOE *d.* CAPPS *v.* CAPPS.

The costs given to a plaintiff, in ejectment, against a mortgagor, after payment of the mortgage money, under 7 Geo. 2, c. 20; are taxed costs, as between party and party.

**MOTION** to review the prothonotary's taxation of costs. In an action of ejectment, brought by a mortgagee against the mortgagor, to recover certain mortgaged premises, the defendant paid the principal and interest due on the mortgage, in pursuance of 7 Geo. 2, c. 20; and the prothonotary, upon taxing the costs of the lessor of the plaintiff, allowed costs as between party and party. The rule was obtained upon the ground that, as the statute directed that the defendant should be discharged from the mortgage, if he "should pay all the principal monies and interest due on such mortgage; and also, all such costs as have been expended in any suit or suits at law or in equity upon such mortgage; such money, for principal, interest, and costs, to be ascertained and computed by the Court, where such action shall be depending, or by the proper officer, by such Court to be appointed for that purpose;"—it was clear that the lessor of the plaintiff was entitled to costs, as between attorney and client.

*Wilde*, Serj., for the mortgagor, shewed cause.—It has been the universal practice of this court, to tax the costs under this statute, as between party and party, and not as between attorney and client (*a*). The term "costs to be ascertained," is well understood, in courts of law, to mean costs as between party and party (*b*). It is stated in an affidavit made by the defendant's attorney, that he has been informed by the officers of the King's Bench and Exchequer, that it is not the practice of those courts, to tax the costs under this statute, as between attorney and client.

*C. Clarke*, in support of the rule.—The affidavit upon which this rule was granted, states that Mr. *Bunce*, one of the masters of the King's Bench, informed the deponent, that it was not usual to tax the costs under this statute, as between attorney and client, but to tax them liberally; and such a taxation would entitle the plaintiff to more costs than on a taxation like this, between party and party. In *Nowell v. Roake* (*c*), it was held in an action for mesne profits, that the plaintiff was entitled to recover by way of damages, expenses incurred in a court of error, in reversing a judgment in ejectment; and that it was reasonable to tax the costs in error, as between attorney and client.

*TINDAL*, C. J.—If this were *res integra*, I should have been inclined to read the statute liberally, so as to give the plaintiff a more complete indemnity; but as it appears to have been the practice of the Court, for so long a period, to tax the costs as between party and party, I am not disposed to interfere, and this rule must be discharged.

*PARK*, J.—I am of the same opinion; and it seems rather difficult to understand the meaning of taxing costs, liberally.

*BOSANQUET*, J., and *COLTMAN*, J., concurred.

Rule discharged.

(*a*) Mr. Prothonotary *Wallington* stated, that this had been the practice in this court for many years.

(*b*) See *Grace v. Morgan*, 1 Hodges, 352.  
(*c*) 7 B. & Cress. 404.

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April 18.

## BOWMAN v. WILLIS.

**A**SSUMPSIT for money had and received. *Plea*—Non-assumpsit. At the trial, before *Tindal*, C. J., at the *Middlesex* sittings, after *Hilary* Term, it was in evidence that the defendant's father had bequeathed certain horses to him, as a legacy: and that, since the testator's death, the defendant had sold one of the horses for 122*l.*, which was the sum sought to be recovered in this action. The plaintiff, who was a horse-dealer, asserted that the horse had only been sent upon trial to the testator, and that it had never belonged to him; and he called *Mr. Curtis*, who was the executor and residuary legatee under the testator's will, to give evidence of admissions made by the deceased, to that effect. It was objected for the defendant, that the witness was interested in the event of the suit, and was therefore incompetent; but the learned judge being of opinion that the case was within 3 & 4 W. 4, c. 42, ss. 26, 27, the objection was overruled, and a verdict was found for the plaintiff.

In an action by a horse-dealer for the recovery of the price of a horse, which had been bequeathed to the defendant, and which he had sold after the death of the testator:—*Held*, that under 3 & 4 W. 4, c. 42, s. 26, the executor and residuary legatee was a competent witness, to prove that the horse had never been sold by the plaintiff, but was merely sent upon trial to the testator.

*Talfourd*, Serjt., moved for a new trial, upon the ground that the evidence ought not to have been received. The witness had a direct and immediate interest in the result of the suit. If a verdict were found for the plaintiff, the effect of it would be to increase the interest of the witness in the residuary estate of the deceased; and the statute 3 & 4 Wm. 4, c. 42, does not apply to a case like this, where the party has a direct and substantial interest in the event of the suit. *Smith v. Prayer* (a). [*Tindal*, C. J.—If the plaintiff had not sold the horse, how could the executor ever be liable?'] If it should appear, that the horse was sold to the deceased, the price of it might be recovered by the plaintiff against the executor; it was, therefore, clearly the interest of the executor, who was also the residuary legatee, to prove that there had been no sale.

*TINDAL*, C. J.—This case appears to me to fall precisely within the meaning of the statute. There are cases where a witness may have a direct interest, independently of the verdict, as in the case of a tenant giving evidence to establish his lessor's title. But no immediate benefit will result to the witness, from the termination of this suit, one way or the other; it is only on the supposition that an action might be brought against the witness for the price of the horse, and that this verdict would be evidence in his favour, that his interest arises. Sec. 26 of the statute, provides that, if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action in which it shall be proposed to examine him, would be admissible in evidence for or against him; such witness shall, nevertheless, be examined: but in that case, a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party, on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him. The fol-

(a) 7 T. Rep. 62. See *Doe d. Bath v. Clarke*, 2 Hodges, 48.

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lowing section directs, that the name of the witness shall be indorsed on the record, with the name of the party on whose behalf he was examined; and that such indorsement shall be sufficient evidence that such witness had been examined. If, therefore, the name of this witness were indorsed on the record, it would not be available to be used by the witness in his favour, in any action which might be brought against him; and I do not see how the interest or situation of the witness could be bettered by the plaintiff's recovering in this action.

BOSANQUET, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule refused (*b*).

(*b*) See *Yeomans v. Leigh*, 1 Murphy and Hurlstone, 87.

### WEBB v. RHODES.

A tenant for life entered into an agreement to let an estate to the defendant; and the agreement, which was executed by the parties, at the office of the plaintiff, who was the intended lessor's attorney, stipulated that a lease and counterpart should be prepared by the attorney, at the expense of the defendant. The tenant for life died, after the lease was prepared, but before it was executed:—*Held*, that the defendant was liable to pay the attorney, half the costs of drawing the agreement; and the costs of an abstract of title, lease, and counterpart.

**A**SSUMPSIT for work and materials as an attorney, provided by the plaintiff for the defendant upon his retainer: and for money paid by the plaintiff to the defendant's use. *Plea*—Non-Assumpsit, and issue thereon. At the trial, before *Park, J.*, at the last *Middlesex* sittings, the following facts were in evidence:—The plaintiff was an attorney at *Reading*, and the defendant was tenant of some land to Miss *Knight*, under a lease which had expired. The plaintiff was Miss *Knight's* solicitor; and on the 24th of *January*, 1834, Miss *Knight* and the defendant having met at the plaintiff's office, the following agreement, which was drawn up by the plaintiff, was executed by Miss *Knight* and the defendant. The yearly rent which the defendant agreed to pay, was less than the rent which he had formerly paid:—"Memorandum of an agreement made the 24th of *January*, 1833, between *M. A. Knight* of the one part, and *J. Rhodes* of the other. The said *M. A. Knight* agrees to let, and the said *J. Rhodes* agrees to take and rent, of and from the said *M. A. Knight*, all those several pieces of meadow or pasture land situate, &c.; and the parties agree that a lease shall be granted, commencing at *Michaelmas* next, for the term of seven, fourteen, or twenty-one years, in case the said *M. A. Knight* shall so long live, at and under the yearly rent, &c., which lease shall contain the like covenants, conditions, and agreements, or such of them as shall be considered necessary, as the lease under which the said *J. Rhodes* now holds the said lands. And it is also agreed, that the said lease and also a counterpart shall be prepared by Mr. *Webb*, solicitor, *Reading*, at the expense of the said *J. Rhodes*." A draft of the lease was subsequently prepared and sent to the defendant, by the plaintiff; but the defendant having objected to some of the covenants, a correspondence upon the subject of the alterations took place between the plaintiff and the defendant's solicitor; and the lease having at length been approved by all parties, the defendant requested that it might be engrossed; but, before it could be executed, Miss *Knight*, who was only a tenant for life of the estate, died, and the lease remained unexecuted. The plaintiff charged the defendant with half the charge of preparing the

agreement; and the whole of the charges for preparing an abstract of the title, and for drawing and engrossing the lease and counterpart.

It was contended for the defendant that, under these circumstances, he was not liable to pay the plaintiff's demand; but a verdict was found for the plaintiff for 14*l.* 2*s.* 9*d.*, including 1*l.* 16*s.*, which was half the plaintiff's charge for the agreement.

*Crowder*, in pursuance of leave reserved, obtained a rule *nisi* to enter a non-suit or to reduce the damages; upon the ground that there was no privity of contract between the parties.

*Hoggins* and *Neville* shewed cause.—In this case there was an actual retainer of the plaintiff by the defendant; and it appears, that when the agreement for the lease was executed, the defendant had not consulted with his own attorney. This circumstance distinguishes this case from others which may be cited, to shew that a retainer is necessary to entitle the attorney to recover his costs. Thus in *Pratt v. Vizard* (a), it was held, that costs of preparing a mortgage could not be recovered, because there was no privity between the parties. *Doe d. Peter v. Watkins* (b) shews that it is a very usual occurrence for an attorney to be engaged by two parties, for the purpose of saving expense. Then it is contended, that the defendant reaped no benefit from the services performed by the plaintiff; but this is not so; for it appeared that a reduction of rent was provided for in the new agreement. Nor could such an objection prevail, even if this were not so, because it was not through any fault of the plaintiff that the lease was not executed; on the contrary, if the defendant had not raised objections to the terms of the lease, it would probably have been executed before the death of the intended lessor.

*Wilde*, Serjt., and *Crowder*, in support of the rule.—It is obvious that the plaintiff was attorney to Miss *Knight*, and not to the defendant. The plaintiff is no party to the agreement between Miss *Knight* and the defendant; and therefore it cannot be said that it amounted to a retainer. In *Grissell v. Robinson* (c), where the lessor paid his attorney's bill for a lease which had been prepared, it was held, that the lessor was entitled to sue the lessee for the amount which he had so paid, it being proved to be the usage, that lessees should pay the expenses of the lease. So here the plaintiff ought, in the first instance, to have obtained payment from Miss *Knight*; and then her executors would have been the proper parties to sue the defendant, if he be liable at all. In *Rigby v. Dakin* (d), where one employed an attorney to raise money on mortgage, and the attorney employed another attorney, who agreed to advance the money on behalf of a client, but the negotiation ultimately failed: it was held, that the attorney of the intended mortgagee could not sue the mortgagor for the costs, although it was proved to be the practice for the proposed borrower to pay the expenses which had been incurred. And, under the circumstances of this case, it is evident that the defendant obtained no benefit by the services of the plaintiff.

TINDAL, C. J.—I see no reason for disturbing this verdict. The question

(a) 5 B. & Ado. 808.

(b) 3 Bing. N.C. 421; 3 Hodges, 25, S. C.

(c) 3 Bing. N. C. 10; 2 Hodges, 138. S. C.

(d) 2 Young & J. 23.

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is, whether the jury were right in finding that there was a retainer of the plaintiff by the defendant. It is not a question whether he was retained as his attorney generally, but whether he was retained to perform this stipulated work. The first item in the charge is half the costs of preparing the agreement. When the parties met at the plaintiff's office, there was no joint purse out of which the expense of the agreement was to be paid; and what is the fair inference which arises, but that each shall pay half. Then the agreement contains a provision that a lease and counterpart shall be prepared by the plaintiff, at the expense of the defendant. Now, all the parties were present at that time; and it is the same as if the plaintiff had been a party to, and had signed the agreement; the effect of the transaction being, that the defendant consented that the plaintiff should prepare the lease, and that he, the defendant, would pay for it. This distinguishes this case from other cases which have been cited, and it is not brought within the principle they have established; and certainly, we should be anxious to avoid circuity of action, when it is possible. I agree that, in some cases, this cannot be avoided; but we should be slow to extend the necessity of putting parties to the inconvenience. As to the first objection, I therefore think that the jury were warranted in finding a verdict for the plaintiff. The next point is, that, as the lease and counterpart were never executed, the defendant obtained no benefit from the services of the plaintiff. But it was not the plaintiff's fault that the lease remained unexecuted; and it was known to all parties that the intended lessor was only tenant for life, and the principle, *Actus Dei nemini facit injuriam*, is applicable. Nor could it be expected, that the plaintiff intended to forego payment, if Miss *Knight* should happen to die before the lease was executed.

PARK, J.—I had no doubt at the trial, and I now think the verdict is right. The case must be considered much in the same way as it would have been if the plaintiff had been a party to the agreement. If he had been, it is impossible that he could have sued Miss *Knight* for the expense of preparing the lease. The cases which have been cited are not applicable.

BOSANQUET, J.—I am of the same opinion. The rule for a nonsuit could not be granted, if the plaintiff is entitled to recover anything. As to the charge for the agreement, it appears to me, that when the parties came together, to the same attorney, each became liable to half the charges. The principal question relates to the costs of the lease and counterpart; and I concur with the judgments which have already been delivered. It is expressly agreed that the documents shall be prepared at the expense of the defendant; and the plaintiff having afterwards prepared them, he would not have been entitled to require payment from Miss *Knight*, although he may have been, originally, her attorney. Then, as to the lease never having been executed, that was not the fault of the plaintiff; it was not executed, in consequence of the death of the intended lessor.

COLTMAN, J.—It appears to me that this case stands clear of any difficulty, provided the facts shew that there was a retainer to do the work. If there were, whether the work was completed or not, the plaintiff would be entitled to recover for the work which was done. And it seems to me that there was evidence from which the jury might infer a retainer. It seems that the plain-

tiff was originally attorney to Miss *Knight*; but it was for the defendant's benefit that he should not have another attorney; and it is a very common practice for an attorney to act for both parties, to save expense.

I give no opinion as to the first item in the bill, for half the expense of the agreement. Nothing appears to be stated as to the expense of preparing it; but, as a decision upon that point in favour of the defendant would only reduce the damages, I agree that this rule must be discharged.

Rule discharged.

## BADEN v. FLIGHT.

April 26.

**COVENANT.** The declaration stated, that on, &c., by a certain indenture, the plaintiff demised unto the defendant a certain messuage, &c., to have and to hold the same unto the defendant, his executors, and administrators, from *Michaelmas* Day then next ensuing, for thirteen years and the half of another year, from thence next ensuing; yielding and paying therefore, yearly and every year during the said term, unto the plaintiff, his executors, administrators, and assigns, the yearly rent or sum of 132*l.* 10*s.*, by four equal and even quarterly payments, each and every year of the said term, that is to say, the 25th day of *December*, the 25th of *March*, the 24th of *June*, and the 29th of *September*, &c. And the defendant did thereby covenant that he would yearly and every year, during the said term thereby granted, well and truly pay or cause to be paid unto the plaintiff, his executors, administrators, or assigns, the said yearly rent or sum of 132*l.* 10*s.*, upon the several days and times, and in manner thereinbefore mentioned and appointed for payment thereof; by virtue of which said demise the defendant entered, &c.; that after the making the said indenture, and during the said term thereby granted, to wit, on the 25th of *March*, 1836, a large sum of money, to wit, the sum of 66*l.* 5*s.*, for two quarters of a year of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due, and still is in arrear, to the plaintiff, contrary to the tenor and effect, true intent and meaning, of the said indenture, and of the said covenant of the defendant by him in that behalf so made as aforesaid.

A declaration in covenant on a lease, alleged, that, after the making of the indenture, to wit, on the 25th *March*, 1836, 66*l.* 5*s.*, for two quarters of a year's rent, ending on the day and year last aforesaid, was due and in arrear, contrary to the indenture. Plea, that no quarter's rent, ending on the said 25th *March*, was due or in arrear, *modo et forma*. Held, upon demurrer, that the plea was bad.

**Plea**—That no quarter's rent, ending on the said 25th of *March*, 1836, then became or was due or in arrear, by virtue of the said indenture in the declaration mentioned, or according to any of the provisos, agreements, covenants, or terms therein contained, or anything therein mentioned, in manner and form as the plaintiff had, in his declaration in that behalf, alleged; and of that the defendant put himself upon the country, &c.

**Demurrer**—For that the plea of *riens en arriere* is not admissible in an action for a breach of covenant for non-payment of rent on a specified day; that the plea ought to have shewn specifically, and with sufficient certainty, how that quarter's rent did not become due or in arrear, or how the defendant was discharged from the payment thereof; that it ought to have shewn how the quarter's rent was paid or discharged, instead of alleging, generally, that it was not due or in arrear; that, as a plea of satisfaction, the plea was bad and argumentative; that it was double, inasmuch as it put in issue, not only that

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the quarter's rent ever became due or in arrear, but also that it was due or in arrear at the time of the commencement of this suit; that the plea ought to have shewn specifically a performance, or excuse for the performance, of the said covenant to pay the quarter's rent.

Joinder in demurrer.

Channell was heard in support of the demurrer. He urged the grounds of demurrer which have been stated.

Hoggins, contrd.—The plaintiff avers in his declaration, that, on a certain day, two quarters' rent was due and in arrear; and the plea puts that fact in issue. The rent might not have been due on that particular day, and the defendant is entitled to traverse the statement.

TINDAL, C. J.—The substantial allegation in the declaration is this, that, during the term, two quarters' rent became due and in arrear; and though a particular day is named, that carries it no further. The defendant has no right to answer that no quarter's rent, ending on that particular day, was due or in arrear. *Hare v. Savil(a)* is an express authority that *riens en arriere* is no plea in covenant, because the plea confesses that the covenant is broken.

BOSANQUET, J., and COLTMAN, J., concurred.

Judgment for plaintiff.

(a) 1 Brownl. & Goldes, 19.

May 6.

OVERTON v. SWETTENHAM and another.

Upon a writ of false judgment from a county court, the sheriff returned a mere transcript of the proceedings which had taken place in the court below, so that it did not appear whether it had jurisdiction to try the cause, whereupon the Court remanded the transcript to be amended.

FALSE JUDGMENT from the County Court of *Denbighshire*. The action was brought in the county court, to recover 1*l.* 10*s.*, and a verdict was found for the plaintiff, subject to leave reserved for the defendant to move to enter a nonsuit, on the ground that the cause of action did not arise within the jurisdiction of the court. Upon the return of the writ of false judgment, the following proceedings were returned by the sheriff:—

“ At the full county court, &c., before *Henry Hert*, &c., four lawful knights of the same county, *William Swettenham* and *Robert Evans Davies* complain against *Thomas Overton*, in a plea of debt of 39*s.* 11*d.*—11th *November*, 1835. Mr. *E. Jones* appears for defendant.—6th *January*, 1836. Declaration. Did grant to pay.—13th *March*, 1836. Motion for particulars.—25th *May*, 1836. Particulars filed.—22nd *June*, 1836. Defendant moved for further time to plead, and a week's time was granted.—30th *June*, 1836. Plea. General issue filed, with notice of set-off, for 2*l.* 2*s.*, for work and labour, care, diligence, attendances, and journees.—20th *July*, 1836. *Similiter*.

“ At the ninth county court, holden, &c., on the 12th *October*, 1836, before, &c., cause tried, verdict for plaintiffs, damages, 1*l.* 10*s.*, but with permission for defendant to move the court, on the 7th *December* next, for leave to set aside the verdict, and enter a nonsuit; or, if the sheriff has no legal right to enter such nonsuit, then that the defendant may move the Court of King's

Bench, in next term, to set aside the verdict, and enter a nonsuit.—At the 11th county court, holden, &c., on the 7th *December*, 1836, rule for nonsuit refused.—19th *December*, 1836. Costs taxed at 12*l.* 9*s.* 6*d.*

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Stephen, Serjt., obtained a rule nisi, calling on the plaintiff below to shew cause why this transcript of the proceedings below, should not be remanded to the sheriff, to be amended according to the facts of the case, if the pleadings therein referred to were delivered or set forth at length; or why the sheriff should not certify the practice of the county court, and shew what forms of pleading were, by the practice of that court, understood to be expressed by the said entries. It was suggested, that, as the proceedings were returned, it was impossible for the plaintiff above to shew, that the debt which had been recovered, was not incurred within the jurisdiction of the county court; and *Williams v. Lord Bagot (a)* was cited, where the Court of King's Bench ordered an inferior court to amend its record, according to the facts of the case, after an imperfect record had been annexed to a writ of error.

Jervis and *R. V. Richards* shewed cause, upon an affidavit, which stated, that it was not the practice in the county court to enter any of the proceedings at length; and that it was not usual to file or deliver any declaration; that by the entry, "Did grant to pay," is understood the old form of *concessit solvere*, formerly used in the local courts of *Wales*, and well known to run in a form containing the words, "and within the jurisdiction of this court.—The matter stated in the affidavit is an answer to this application. If a declaration is necessary, it is the duty of the plaintiff to prepare it; but the sheriff is not bound to expand the proceedings. [*Tindal*, C. J.—The sheriff tried this cause, upon the faith that something more was to be done. *Coltman*, J.—It is a common practice among magistrates to take mere minutes of their proceedings, and to put them into form afterwards.] The Court has no power to order a bad record to be amended; and if the declaration is incorrect, then it will be to the injury of the defendant in error.

TINDAL, C. J.—If this had been returned in the shape of a record, we should not have interfered; but this is obviously a mere note of what passed in the court below. This application is analogous to alleging diminution in a writ of error, where the party prays a writ to the justices who certified the record, to certify the whole of it. But as the defendant below is not entitled to allege diminution in this case, this rule must be made absolute, on payment of costs.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute (b).

(a) 4 Dow. & Ry. 315.

(b) See a form of a declaration in a county

court, Tidd's Forms, 574, 9th ed. *Dunn v. Crump*, 3 Brod. & Bing. 309.

May 2.

STALEY v. LONG.

The party who virtually succeeds in an action is entitled to the custody of the postea; therefore, where, in trespass, a verdict, with one shilling damages, was found for the plaintiff on Not Guilty, and on an issue as to the property in the close; and a verdict for the defendant on an issue as to a right of way over the close, it was held, that the postea ought to have been delivered to the defendant.

TALFOURD, Serjt., obtained a rule nisi, calling upon the plaintiff to shew cause why the postea which had been delivered to him, should not be delivered to the defendant; to enable him to proceed with the taxation of costs in an action of trespass, for breaking and entering the plaintiff's close. The defendant pleaded, first, Not Guilty; secondly, that the plaintiff was not possessed of the close; and, thirdly, a right of way over the *locus in quo*; upon which issues were joined. A verdict was found for the plaintiff on the first and second issues, with one shilling damages; and for the defendant on the third issue.

Ludlow, Serjt., shewed cause.—The question is, whether, as the plaintiff has recovered damages upon two of the issues, he is not entitled to the custody of the postea. There can be no difference, in principle, between a verdict for a thousand pounds and for one shilling. In *Smith v. Edwards*^(a), it was broadly laid down by *Coleridge*, J., that, if the plaintiff succeeds, and recovers damages on part of his cause of action, he is entitled to have the postea delivered to him. [*Park*, J.—In contemplation of law, the postea remains in court.]

Talfourd, Serjt., *contrà*.—The plaintiff has refused to produce the postea to the prothonotary, to enable him to tax the costs; and, as the costs to be received by the defendant exceed the amount of the plaintiff's costs, the plaintiff is interested in delaying the progress of the taxation. It is evident that the real substantial issue in the cause has been found for the defendant (b).

TINDAL, C. J.—The plaintiff has recovered a verdict on the two first issues, and the defendant on the third, which establishes the right of way over the plaintiff's close. It is evident that the great burthen of expense at the trial would arise upon the issue found for the defendant, because it involved the substantial question between the parties; and as the balance of the taxed costs must be very much in favour of the defendant, the plaintiff will be naturally slow in proceeding to tax the costs. It was a little slip on the part of the jury to give a shilling damages to the plaintiff, and it is because they have done so, that the officer of the court has thought that the plaintiff was entitled to the postea; but it seems to me, that the defendant is entitled to the custody of it; and this rule must be made absolute.

PARK, J., concurred.

BOSANQUET, J.—The plaintiff will be entitled to his costs on the first and second issues, which were unnecessarily put upon the record; but, as the defendant substantially succeeded in the action, the postea has been improperly delivered to the plaintiff; and this rule must be made absolute.

COLTMAN, J.—The postea ought to have been delivered to the party who substantially succeeded in the action.

Rule absolute.

(a) 1 Har. & Wol. 497.

(b) See *Knight v. Woore*, ante, p. 1.

DOE d. DAFHEY v. SINCLAIR.

May 3.

MANSEL applied for the discharge of a prisoner, under 48 Geo. 3, c. 123, who had been in prison for more than twelve months, for the damages and costs of an action of ejectment. The damages were one shilling; costs, 2*l*.; and increased costs, 24*5**l*. 1*9**s*., making, altogether, 248*l*.; for which sum the defendant had been taken in execution.

A defendant in custody for twelve months for the nominal damages in ejectment, and for costs beyond 20*l*., is entitled to his discharge under 48 Geo. 3, c. 123.

Butt appeared to shew cause in the first instance.—In *Doe d. Threlfall v. Ward*(a), it was certainly held, that a prisoner in custody on a judgment in ejectment was entitled to the relief given by the statute; but there the costs were less than 20*l*. But *Doe v. Reynolds*(b) is an express authority, that, in such a case, the statute does not apply; and Lord *Tenterden*, C. J., says, “I am of opinion, that this is not a case within the statute. The object of the statute was, to relieve persons in execution upon a judgment for a debt or damages. Here the defendant is in execution for the costs of an ejectment. The object of a party instituting such a proceeding is, to recover the possession of land, and not any debt or damages.” This case was not cited in *Doe d. Threlfall v. Ward*(a).

TINDAL, C. J.—The words of the statute are decisive. It applies “to all persons in execution, upon any judgment, for any debt or damages not exceeding the sum of 20*l*., exclusive of the costs recovered by such judgment.” The rule must be absolute.

PARK, J., **BOSANQUET**, J., and **COLTMAN**, J., agreed.

Rule absolute(d).

(a) 2 M. & Wels. 65.

(b) 10 B. & Cress. 481.

(d) See also *Doe d. —*, 1 Dowl. P. C. 69.

CONS v. KIRK.

May 4.

A RULE had been obtained to set aside a judgment, upon affidavits which disclosed the following facts:—

On the 13th of *March*, the defendant in the action was served with a writ of summons in debt; and, on the 21st of *March*, notice of a declaration in *assumpsit* for goods sold and delivered, was served, with a notice to plead. On the 25th of *March*, the defendant's attorney wrote to the plaintiff's attorney to inform him, that the defendant intended to pay the debt and costs, and requiring to know how the action then stood; but no answer was received. Judgment for want of a plea was signed on the 10th of *April*, in debt.

Addison shewed cause.—The defendant ought to have applied to set aside the declaration, for irregularity; and the letter of the 25th of *March* amounted

defendant might have expected to receive notice of a writ of inquiry.

A writ of summons had been served in debt, and afterwards a declaration in *assumpsit*. The defendant did not apply to set aside the proceedings for irregularity, but, the plaintiff having signed judgment, in debt, for want of a plea, the Court set it aside, upon the ground that the

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to a waiver of the irregularity complained of. In *Smith v. Clarke* (a), it was held, that interlocutory judgment could not be set aside, because the notice of declaration was unnecessary. *Rutty v. Arbur* (b).

TINDAL, C. J.—When the defendant's attorney saw a declaration in assumpsit, he might reasonably suppose that execution would not issue, until a writ of inquiry had issued; and he might have been contented to wait, until he received notice of its execution. The plaintiff's attorney does not answer the letter of the 25th of *April*, to inform him how the proceedings then stood. The rule must be made absolute, the defendant undertaking not to bring any action.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

(a) 2 Dow. P. C. 218.

(b) 2 Dow. P. C. 36.

END OF EASTER TERM.

# CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS.

IN

Trinity Term, 1837.

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BEALE and another v. S. SAUNDERS and C. SAUNDERS.

June 7

**A**SSUMPSIT upon an implied agreement, to repair a certain brewery and premises, called the *Wheat Sheaf Brewery*. The first count of the declaration stated, that the defendants *had become and were tenants* to the plaintiffs, of a certain brewery and premises, situate, &c.; and, in consideration thereof, they undertook and promised that they, the said defendants, should and would, at their proper costs and charges, from time to time and at all times thereafter, during their said tenancy, well and sufficiently repair, uphold, support, and maintain, mend, and keep, the said brewery and premises, and all and singular the erections and buildings then erected and built, and thereafter to be thereon erected and built, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need or occasion should require, (fire, which might happen to destroy the said premises or any part thereof, only excepted). That the defendants were and continued tenants of the said brewery and premises, to the

In assumpsit, the declaration stated, that the defendants had become and were tenants to the plaintiffs, of a brewery, and in consideration thereof, they undertook to repair the same. *Breach*—that the defendants suffered and permitted the premises to be ruinous and prostrated. A verdict was taken for the plaintiffs, sub-

ject to a special case, which stated the following facts:—In 1769, a lease of the premises in question was made to one *Uppom*, by a tenant for life, for a term which expired in 1830; and that lease contained a covenant from the lessee to repair the premises. *Samuel Sanders* became the assignee of the lease, and in 1795, he made an under-lease at an improved rent, and *Samuel Sanders*, during his life-time, and the defendants, after his death, paid the rents reserved in the lease of 1769, until 1827; and received the improved rent, payable under the lease of 1795, until 1830. The plaintiffs were assignees of the reversion, and, in 1830, the premises were in a very dilapidated state; but it was then ascertained, that the lease of 1769, was void, because the tenant for life had exceeded his power of leasing. *Held*, first, that as all the parties had treated the lease as being valid, the defendants were bound by the terms of it; and that they were liable to pay such an amount of damages, as would be sufficient to put the premises in repair at the expiration of the term; and that the declaration disclosed a sufficient consideration to support the promise; also, that the defendants were liable to pay the rent reserved in the lease of 1769, until its expiration, but that they were not liable for rent or dilapidations after 1830.

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plaintiffs, for a long space of time, to wit, from the time of making of the said promise and undertaking hitherto; nevertheless, that the defendants did not, nor would, after the making of their said promise and undertaking, well and sufficiently repair, uphold, support, maintain, mend, or keep, the said brewery or premises, in, by, and with all, and all manner of needful and necessary reparations or amendments, (fire only excepted); but, on the contrary thereof, the defendants, after the making of their said promise and undertaking, and during the continuance of their said tenancy, to wit, on the day and year aforesaid, and from thence hitherto, wrongfully and unjustly suffered and permitted the said brewery and premises to be ruinous, broken down, prostrated, and destroyed, and the same to remain and continue so ruinous, broken down, prostrated, and destroyed. There was a second count, for use and occupation of the same premises, and upon an account stated. The defendants pleaded the general issue, and three other pleas traversing the allegations, in the first count, but no question arose on the pleas; if any question should turn upon the declaration, or the form of it, or upon the pleas, they were to be deemed part of this case, and might be referred to accordingly. The cause was tried before *Tindal*, C. J., at *nisi prius*, at the sittings after *Hilary* Term, 1836, when a verdict was found for the plaintiffs, subject to the opinion of this court, on the following case:—

*Theophilus Salway*, being seized in fee of the premises in question, on the 12th *August*, 1756, by his will devised the same to his brother, *Richard Salway*, for life: remainder to his first and other sons in tail; remainder to the Rev. Dr. *Thomas Salway* for life; remainder to *John Salway*, son of the said *Thomas Salway*, for life; remainder to the first and other sons of the said *John Salway*, with remainders over; and which said devise contained the following power of leasing:—"that it shall be lawful for the said several tenants for life, when and as they shall respectively come into possession of my said estates, by virtue of the limitations aforesaid, to make leases thereof, for any term or number of years, not exceeding 21 years, at the best improved rents that can be gotten, without taking any fine for making the same; so as such leases be made to take place in possession, and do contain usual covenants; and I further empower the said tenants for life, when they shall respectively come into possession of my said estates, as aforesaid, to make leases of houses or ground in *London*, or the county of *Middlesex*, for any term or number of years, not exceeding 61 years, for the purpose of building, rebuilding, or substantially repairing the said estates; but without taking any fine, and so as there be reserved thereon the best rent that can reasonably be got, according to the nature and circumstances of the case, and so as such leases do contain all proper and reasonable covenants.

*Theophilus Salway*, after thus making his will, died on the 1st *May*, 1760; and *Richard Salway*, his brother, the first devisee for life, became possessed of the premises in question, under the said devise. On the 19th *July*, 1763, by indenture of lease of that date, the said *Richard Salway* demised the premises to one *James Whalley*, for the term of 21 years, at the yearly rent of 5*l.*; and afterwards, by indenture of lease dated the 6th *July*, 1769, made between the said *Richard Salway*, of the one part, and *George Uppom* and *Thomas Main*, of the other part, after reciting the indenture of lease dated the 19th day of *July*, 1763, and that by several mesne assignments, the term thereby granted had become vested in one *George Wheeler*, who had died; and that it

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was then the property of his executors and executrix, who, by indenture of lease dated the 29th *January*, 1768, had demised the said premises, with the buildings thereon, to the said *George Uppom* and *Thomas Main*, for the residue of the said term of years, at the yearly rents, covenants, and agreements, in the underlease, last aforesaid mentioned; and also reciting, that the said *George Uppom* and *Thomas Main*, since the granting of the said lease to them, had erected several buildings on the said premises; and that, for the better carrying on of their trade of soap-boilers, they intended to erect several other buildings. It was witnessed, that the said *Richard Salway* did demise and let the said premises unto the said *George Uppom* and *Thomas Main*, their executors, administrators, and assigns; to have and to hold the same to them, their executors, administrators, and assigns, from the end and expiration of the term of 21 years, mentioned in the said hereinbefore recited indenture of lease, granted by *Richard Salway* to *James Walley*, for the term of 46 years, from thence next ensuing; yielding and paying, therefore, yearly and every year, during the said term of 46 years, thereby granted unto the said *Richard Salway*, his executors, administrators, and assigns, the yearly rent or sum of 10*l.*, free of all deductions, by half yearly payments, on the 29th *March* and the 29th *September*, every year; the first payment to begin and to be made on the 29th *September*, next following the end and expiration of the said term of 21 years, granted by the said *Richard Salway*, to the said *James Whalley*; and the said *George Uppom* and *Thomas Main* for themselves, their executors, administrators, and assigns, did thereby covenant and grant to and with the said *Richard Salway*, his heirs, executors, administrators, and assigns, that they, their executors, administrators, or some of them, should and would, at their or some or one of their proper costs and charges, from time to time, and at all times thereafter, during the said term, well and sufficiently repair, uphold, support, sustain, maintain, pave, purge, scour, cleanse, empty, mend, and keep the said piece or parcel of land, and all and singular the erections and buildings then erected and built, or thereafter to be erected and built, on the said premises, with the appurtenances thereinbefore demised, and every part and parcel thereof, in, by, and with all and all manner of needful and necessary reparations, support, paving, purging, scouring, cleansing, emptying, and amendments, whatsoever, and that when, where, and as often as need, or occasion should be and require; and the said piece or parcel of land with the erections and buildings thereon erected and built, or to be erected and built, and other the premises being so well and sufficiently repaired, supported, paved, purged, scoured, cleansed, emptied, and amended, at the end of the said term, or other sooner determination of that demise unto the said *Richard Salway*, his executors, administrators, and assigns, should and would peaceably and quietly leave, surrender, and yield up, (fire which might happen to destroy the said premises, or any part thereof, only excepted.)

*Richard Salway* died on the 25th *July*, 1775, and *John Salway*, (the Rev. Doctor *Thomas Salway* being dead,) became seized of the premises, as tenant for life; remainder to his first and other sons in tail as aforesaid: the said *John Salway* joined with his son, *Richard Salway*, in *May*, 1795, in suffering a common recovery of the said premises; and, by indenture dated 15th of *May*, 1795, it was declared, that such recovery should enure to the use of the said *John Salway* for life, with remainder to the said *Richard Salway*, his son in fee. On the 10th *June*, 1803, the said *John Salway* died, and, on the 14th

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*January, 1825*, the said *Richard Salway*, being seized in fee, as aforesaid, of the premises, by his will devised the same to the plaintiffs, upon certain trusts in the will mentioned, and nominated them his executors. On the 10th *February, 1825*, the said *Richard Salway* died.

The lease of 1763, aforesaid, and the term of 21 years thereby created, and the indenture of 1769, aforesaid, and the term alleged to have been thereby created, as aforesaid, afterwards vested in one *Samuel Sanders*, by assignment.

By indenture, dated 28th *September, 1795*, made between the said *Samuel Sanders*, of the one part, and *John Oxley* and *Frederick Teush*, of the other part; reciting that, by an indenture of lease dated 5th *September, 1781*, it was witnessed, that in consideration of 150*l.*, and for other the considerations therein mentioned, the said *Samuel Sanders* did demise and lease to *James Haig, John Haig, and John White*, the premises in question; to hold the same from *Michaelmas*, then next, for 14 years, under the yearly rent of 76*l.*, payable quarterly, with a proviso, to grant a further lease at the expiration of the said term, upon certain terms, and reciting, that the right of renewal had become vested in the said *John Oxley* and *Frederick Teush*, who had requested the said *Samuel Sanders*, to grant them a lease for the term of 40 years, to be computed from the day of the said indenture of lease, which the said *Samuel Sanders* had agreed to do; and also, to grant them a further term of eight years and three quarters therein.

It is by the said indenture of the 28th *September, 1795*, witnessed, that in consideration of 372*l.* to the said *Samuel Sanders* paid, the said *Samuel Sanders* did demise the said premises unto the said *John Oxley* and *Frederick Teush*, with the buildings, then or thereafter to be built thereon; to hold the same unto the said *John Oxley* and *Frederick Teush*, their executors, administrators, and assigns, for the term of 34 years and three quarters, from *Michaelmas* then next, at the yearly rent of 76*l.*, which said last-mentioned lease contained a covenant, from the lessees, that they would repair the premises during the term, and quietly yield up the possession thereof, at the expiration thereof, with certain fixtures. The lease also contained a power of entry for the said *S. Sanders*, to view the state of the repairs, and a proviso, that if default should be made in doing repairs after notice, or in observing the covenants, then that the said *S. Sanders* might re-enter, and eject the occupier of the premises.

The said *Samuel Sanders* received the said rent of 76*l.* annually, until his death, which happened on the 10th *July, 1815*; the defendants received the said rent of 76*l.*, from that period until *Lady day, 1830*.

The said *Samuel Sanders*, deceased, paid the rent of 10*l.* reserved by the indenture of lease of the 6th *July, 1769*, from the year 1794, until his death; and the said defendants afterwards paid the said annual rent of 10*l.* to the said *Richard Salway*, until the death of the said *Richard Salway* in 1825, as aforesaid; and they afterwards paid to the plaintiffs the said rent, from that period until *Christmas, 1827*, since which time they have not paid any rent for the said premises. In 1828, one *Ayres*, who was then in possession of the said premises, began to pull down and destroy the buildings thereon, then erected. About *February, 1829*, one *Burton* got possession of the premises, and all the said buildings have since been totally annihilated and destroyed, and the place is now in the same state.

The question for the opinion of the Court is, whether the plaintiffs are or are not entitled to recover upon both or either of the counts of the said de-

claration; and if the Court shall be of opinion, that the plaintiffs are so entitled, then, inasmuch as the amount of damages is to be settled and determined by an arbitrator, named by the parties, another question for the opinion of the Court will be, upon what principle the said damages shall be calculated.

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*Archbold*, for the plaintiffs. The lease of 1769 was not duly made under the power of leasing, given by the will of *Richard Salway*. It was, therefore, void, and the plaintiffs cannot now maintain covenant upon it (a); *Doe d. Pulteney v. Cavan* (b). But as the premises were held over, the defendants will now be treated as tenants from year to year, and as such they are liable to repair these premises. Here there has been both permissive and commissive waste. By the stat. of *Gloucester*, 6 Edw. 1, the lessor may have an action of waste, or upon the case in the nature of waste, against the lessee, if he permits the house to be out of repair, Lit. sec. 67; and although a tenant at will would not be liable, Lit. sec. 71, yet a tenant from year to year, is within the meaning of this statute, 1 Saund. 323 b. In *Gibson v. Wells* (d), where it was held that an action did not lie for waste, the waste was permissive and not commissive, and the party sued was only tenant at will. *Brown v. Crump* (e) came on upon demurrer, and the plaintiff had not alleged any special agreement to take the farm, upon terms which the law would not imply, without a special custom or agreement; and it was not finally decided, but the plaintiff had leave to amend. *Herne v. Bembow* (f), is an authority to shew that the defendants may be liable upon an implied assumpsit. Secondly, the defendants are liable to all the terms which are to be found in the covenants of the lease of 1769. All parties have acted upon that lease, as if it were valid; the defendants and the previous assignees paid the yearly rent of 10l.; and when *Samuel Sanders* granted the under leases to *Oxley* and *Teush*, the covenants entered into by them, are similar to those which are contained in the lease of 1769; and, under those covenants, the defendants will be entitled to sue the assignees of *Oxley* and *Teush*. There are several authorities to shew that the defendants are bound by the terms of the void lease. In *Doe d. Rigge v. Bell* (g), it was decided, that if a landlord lease for seven years by parol, and agree that the tenant shall enter at *Lady Day* and quit at *Candlemas*, though the lease be void by the statute of frauds, as to the duration of the term, the tenant, nevertheless, holds under the terms of the void lease. So in *Richardson v. Gifford* (h), where it was proved, that the defendant took a house, by a written agreement, for three years and a quarter, and engaged to keep the premises in good repair during the time they should be in his occupation, but the agreement was neither stamped as a lease, nor signed by the parties, it was held, that the defendant was bound by the covenant to repair, though the agreement was void as to the duration of the term; and in that case, the defendant was also held liable upon a count in assumpsit, which stated that, in consideration that the defendant had become tenant to the

(a) In a former action, the plaintiffs declared on the covenant contained in that lease; but the defendants having demurred, upon the ground that the lease was not executed in pursuance of the power, the plaintiffs discontinued the proceedings, and brought the present action.

(b) 5 T. Rep. 567.

(d) 1 New. Rep. 290.

(e) 1 Marsh. 567.

(f) 4 Taunt. 764.

(g) 5 T. Rep. 471.

(h) 1 Ado. & Ellis, 52.



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plaintiffs, upon the terms that he should keep the premises in tenantable repair, the defendant agreed so to keep them in repair during the tenancy. As to the mode of computing the damages, the plaintiffs are entitled, under the second count, to recover rent at the rate of 10*l.* per annum, from *Christmas*, 1827, when the last payment was made, up to the 19th of *July*, 1830, when the supposed lease of 1769, expired; and from that period, until the commencement of the action, the plaintiffs are entitled to recover such a sum of money as the premises would have let for, if they had been yielded up in good repair in *July*, 1830.

*Wightman* for the defendants.—It may be assumed, for the purpose of argument, that the defendants held under all the terms of the lease of 1769; but if that were so, the declaration would be insufficient to charge the defendants. It merely avers that they, the defendants, became tenants to the plaintiffs, and that, in consideration thereof, they undertook to repair the premises. But that consideration is not sufficient to support the promise. The defendants are tenants at will, or, at most, tenants from year to year, and the only obligation which the law implies under such a holding is, that the premises shall be used in a tenant-like manner. But the law will not imply a contract to keep them in repair. *Anworth v. Johnson* (i), *Torriano v. Young* (k), *Horsefall v. Mather* (l). A declaration is never framed as this is, when such liabilities as this case discloses, are sought to be enforced (m). [*Tindal*, C. J.—We are to look at all the facts in the case: this would be a proper argument in arrest of judgment.] If the facts of the case are not sufficiently shewn in the declaration, to make the defendants liable in this action, they are entitled to urge the objection, as if this were a motion in arrest of judgment. This is an antecedent consideration which is clearly insufficient; and no executory contract to repair, is alleged in the declaration. *Brown v. Crump* (n) is an express authority. There a declaration that, in consideration that the defendant had become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the premises in repair, was held to be insufficient; because, these obligations did not arise out of the bare relation of landlord and tenant. *Gibson v. Wells* (o), and *Herne v. Bembow* (p), are authorities to shew that an action on the case does not lie for permissive waste. Here the declaration charges the defendants with permissive waste, but the facts shew commissive waste. Nor is any connexion shewn in the case between *Samuel Sanders*, who died in 1815, and the defendants. The only facts which affect them are, that they paid and received the rents of the premises after his death; but it is not stated in what character or under what circumstances these acts were done. [*Tindal*, C. J.—A very strong inference is raised, that they claimed an interest in the premises.] It is stated that, in 1828, one *Eyers* pulled down the buildings, but how *Eyers* came into possession does not appear; for any thing which is stated, he might have been assignee. Why are the defendants to be held liable for the acts done by

(i) 5 Car. & P. 239.

(k) 6 Car. & P. 8.

(l) Holt's N. P. C. 9.

(m) See 2 Chitty, on Pleading, 193, note (k), 6th ed.

(n) 1 Marsh. 567.

(o) 1 New Rep. 290.

(p) 4 Taunt. 764.

*Eyres*?—At all events, the defendants cannot be held to be liable for any of the damages which are alleged to have been sustained after *July*, 1830, when the lease expired. There is nothing stated from which it can be inferred, that the defendants held over after the expiration of the term.

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*Archbold* in reply.—There ought to have been a special demurrer, if the form of the declaration were objected to, and then the plaintiffs would have had leave to amend, if an amendment were necessary. But now the Court is required to give an opinion upon all the facts which are stated in the case.

*TINDAL, C. J.*—The way in which this case ought to be considered, is this, that the defendants are found in possession of the premises, under a lease which is void, in consequence of not having been made in pursuance of the power contained in the will of *Theophilus Salway*. It appears that the defendants and one *Samuel Sanders* had for several years paid the rent reserved by that lease; and the consequence is, that though the lease was void, they must be taken to have held the premises subject to the terms and conditions specified in it. Therefore, we get rid of the difficulty which has been raised by the defendants' counsel, namely, that a tenant from year to year, is not liable for permissive waste. The original lease was granted in 1763, and then another lease to expire in 1830, subject to a yearly rent of 10*l.* It is stated in the case, that first, the original lessee, then *Samuel Sanders*, and afterwards the defendants, paid the rent of 10*l.* until 1827; and also, that *Samuel Sanders* made an under lease of the premises, at an improved rent in 1795, and that the defendants received that improved rent until 1830. Putting these facts together, the fair inference is, that the defendants considered that they were going on under the terms of the lease of 1769; and, therefore, I am of opinion, that the first count of the declaration is made out in evidence, and there must be a verdict for the plaintiffs. *Powley v. Walker* (q) is an authority to shew that the mere relation of landlord and tenant, is a sufficient consideration for a promise to manage a farm in a husband-like manner. It is clear, that the investigation of the damages can extend no further than to *July*, 1830. If strangers have entered since that period, the defendants are not liable for their acts. As to the damages to be recovered under the second count, it appears that the defendants have continued to receive the improved rent of 70*l.* until the term of 1795 expired, and that they have paid the rent of 10*l.* until 1827. They are, therefore, liable to pay 30*l.* for the remaining three years' rent, up to 1830.

*PARK, J.*—Although this lease of 1769 was void, the defendants must be taken to have held under the terms contained in it, just as if the lease had been valid. It is similar to the case of a party who holds over, after a lease has expired. As to the amount of rent to be received, I agree that it must be calculated up to the expiration of the term; and the repairs must also be calculated according to the damages which were sustained at the same period. I entirely concur in the decision of *Powley v. Walker* (q).

*VAUGHAN, J.*—*Doe d. Rigge v. Bell* (r), is a very strong authority in favour

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of the plaintiffs. This is not unlike the common case of a tenant remaining in possession of premises, upon the same terms as are contained in a lease which has expired.

COLTMAN, J.—I am of opinion, that the plaintiffs have a substantial ground of action, upon which they are entitled to recover. The defendants must be treated as holding under a void lease, which all parties have treated as a valid lease. Although an action of covenant could not be maintained, yet, as the defendants continued to occupy the premises, on the terms contained in the lease, the plaintiffs are entitled to have the premises delivered up to them, at the expiration of the term, in the state provided for by the covenants. A further question arises, as to the sufficiency of the declaration, which is not free from some doubt and difficulty; but I think, considering the objection as taken after verdict, that the declaration is sufficient. Cases have been cited to shew that, although from the mere relation of landlord and tenant the law will imply certain liabilities; yet, that it is doubtful whether more will be implied than that the premises shall be used in a husband-like manner. Here it is expressly averred, that the defendants had become and *were* tenants to the plaintiffs. The only objection taken to the declaration is, that it is founded on a past consideration, but this is a continuing valuable consideration; and I cannot see why it may not be sufficient to support an express promise to repair, although it may not be sufficient to support an implied promise.

Judgment for the plaintiffs.

June 6.

D'OYLEY v. ROBERTS.

In an action for slander, by an attorney, the declaration stated that the defendant published of and concerning the plaintiff, and of and concerning him in the way of his profession, these words, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster;" it was in evidence that the plaintiff was accustomed to bet at horse-races, and the jury found that the words were not spoken of him as an attorney, but that the slander had a tendency to injure him morally and professionally. A verdict was found for the plaintiff, and a rule nisi having been obtained to enter a nonsuit, the Court held, that the defendant was not entitled to a nonsuit, but they arrested the judgment.

SLANDER. The declaration stated, that the plaintiff was a person of good name and credit, and that he was an attorney of the King's Bench, and had always, and still did, use, exercise, and carry on, the profession and business of an attorney, with honesty, integrity, credit, and reputation, and had not ever been guilty, or, until the committing the grievances by the defendant, as thereafter mentioned, been suspected to have been guilty of the fraud, dishonesty, or misconduct, as thereafter mentioned to have been charged or imputed to him, by the defendant; by means of which said premises the plaintiff had acquired the esteem and good opinion of his clients and neighbours, to whom he was in anywise known: and also, by reason of the aforesaid premises, the plaintiff, in the way of his said profession and business, was daily and honestly acquiring great gains and profit therein; yet the defendant, well knowing the premises, but greatly envying, &c., and contriving, and falsely and maliciously intending, to injure the plaintiff in his aforesaid good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst his clients and neighbours, and to injure the plaintiff in his said profession and business of an attorney, as aforesaid; and to cause it to be suspected and believed, by those clients and neighbours, that

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the plaintiff had conducted himself improperly, fraudulently, and dishonestly, and to vex, harass, oppress, and impoverish, and wholly ruin, the plaintiff, heretofore, to wit, on, &c., in a certain discourse which the defendant then had, of and concerning the plaintiff, and of and concerning him in his said profession and business, in the presence of divers good and worthy subjects of our lord the now king, then, in the presence and hearing of such subjects, falsely and maliciously spoke and published, of and concerning the plaintiff, *and of and concerning him in the way of his said profession or business*, the false, scandalous, malicious, and defamatory words following, that is to say, *He (meaning the plaintiff) has defrauded his (meaning the plaintiff's) creditors, and he (meaning the plaintiff) has been horsewhipped off the course at Doncaster.* By means of the committing of which said several grievances, by the defendant, as aforesaid, the plaintiff had been and was greatly injured in his aforesaid good name, fame, and credit; and also greatly injured in his said profession and business, and brought into public scandal, infamy, and disgrace, with and amongst his clients and neighbours, insomuch that divers of these clients and neighbours had, on account of the committing of the said grievances, suspected and believed, and still did suspect and believe, the plaintiff to be a person guilty of fraud and dishonesty, and to have acted improperly and dishonestly in his said profession and business of an attorney, as aforesaid; and had, by reason thereof, wholly refused to have any acquaintance or discourse with the plaintiff, or to employ or have any transactions with him in the way of his profession or business, as they were accustomed before to have, and otherwise would have had: and, in particular, by means of the premises, one, who before the committing of the said grievances had been accustomed to retain and employ the plaintiff in his said profession and business, and who would otherwise have continued to retain and employ him in his said profession and business, for profit and reward to the plaintiff, in that behalf, had from thence hitherto, ceased to retain and employ, and would not thereafter retain and employ, the plaintiff in his said profession and business; and, by reason of the premises, the plaintiff had been greatly vexed, &c., and had lost great gains in his said profession, to the damage, &c.

*Plea*—not guilty.

At the trial, before *Parke, B.*, at the last *Gloucester* assizes, the plaintiff proved the speaking of the words by the defendant, but failed in giving evidence of any special damage. It appeared that the plaintiff was an attorney, but that he frequently attended races and steeple-chases, where he was accustomed to bet, and sometimes to ride a race himself. The learned judge left two questions to the jury: first, whether the words were spoken of the plaintiff as an attorney; and, secondly, if they were not, whether the slander had a natural tendency to injure him in his business as an attorney. The jury found that the words were spoken of and concerning the plaintiff, but not of and concerning him in his business of an attorney; and that the words had a natural tendency to injure him morally and professionally. A verdict was entered for the plaintiff, with 50*l.* damages.

*Godson* obtained a rule *nisi* to enter a nonsuit, in pursuance of leave reserved: upon the ground that the words were not actionable in themselves, and that, as the jury had found that they were not spoken of the plaintiff as an attorney, the action could not be maintained.

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*Talfourd*, Serjt., and *Busby*, shewed cause.—The defendant might have demurred to that portion of the declaration, in which the plaintiff represented himself to be aggrieved in his character of an attorney, as in *Wyatt v. Harrison* (a). But now, as the jury have found that the words were spoken by the defendant, and that they had a tendency to injure the plaintiff morally and professionally, the verdict must stand. A person who fills any office, is supposed to possess qualifications for performing his duties; and the rule laid down in *Onslow v. Horne* (b), is, that "words are actionable, when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, or businesses, and do or may probably tend to their damage." That rule was certainly qualified in *Lumby v. Allday* (c). In that case, *Bayley*, B., said, "Every authority I have been able to meet with, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." But this case comes within the latter part of that principle, because it is alleged that the words were spoken of the plaintiff as an attorney. [*Tindal*, C. J.—Here the jury have negatived that the slander was spoken of the plaintiff as an attorney.] In *Stanton v. Smith* (d), it was held to be actionable to say of a tradesman, "He is a sorry, pitiful fellow, and a rogue; he compounded his debts at 5s. in the pound," although there was no colloquium of his trade. *Whittington v. Gladwin* (e), *Southam v. Allen* (f). In 1 Vin. Abr. tit. Actions for Words, (S. a. 2.) it is said "that the words 'you are well known to be a corrupt man, and to deal corruptly,' being spoke of a sworn attorney, are actionable, because it touches him in his oath, and also in the duty of his profession, whereby he acquires his living,"

*Godson* and *W. J. Alexander*, *contrà*.—The latest authorities shew that this action cannot be maintained. In *Ayre v. Craven* (g), it was held that, in an action for defamation, for words charging a physician with adultery, it is not sufficient to state that the misconduct was imputed to the plaintiff in his profession, but the declaration ought to set forth in what manner such misconduct was connected by the speaker with that profession; and, therefore, where the declaration alleged that words containing such an imputation, were spoken of and concerning the plaintiff carrying on the profession of a physician, and of and concerning him in his profession, without more, judgment was arrested. If the defendant should not be entitled to a nonsuit, then, according to the decision in *Lumby v. Allday* (c), the Court will allow the defendant to arrest the judgment. [*Tindal*, C. J.—I do not see that it would make any difference to the plaintiff, if we were now to consider this as a motion in arrest of judgment.] The cases which have been cited, as to words spoken of tradesmen, are not applicable. The plaintiff is not described as a money scrivener, but as an attorney; and as such he is not liable to the bankrupt laws, nor is he necessarily supposed to have any creditors. In *Richardson v. Allen* (h), it was held, that to say of a man that he had defrauded a mealman of a roan horse was not actionable.

- (a) 3 B. & Ado. 871.
- (b) 3 Wilson, 186.
- (c) 1 Tyr. 217.
- (d) 2 Lord Ray. 1480.
- (e) 5 B. & Cress. 180.

- (f) Sir T. Raymond, 231.
- (g) 4 Nev. & Man. 220; 2 Ado. & Ellis, 2.
- (h) 2 Chitty, Rep. 657.

TINDAL, C. J.—We must consider this case as if the rule were drawn up in the alternative for a nonsuit, or in arrest of judgment. I cannot see any ground for granting a nonsuit, because there was evidence to go to the jury. But if the verdict were entered for the plaintiff, then I am of opinion that the judgment must be arrested. The plaintiff was an attorney, and the declaration states that he carried on his business of an attorney, with honesty, integrity, credit, and reputation. The rule to be found in Comyns's Digest, tit. Action upon the Case for Defamation, D. 27, is, "that words not actionable in themselves, are not actionable when spoken of one in an office, profession, or trade, unless they touch him in his office. Mod. Ca. 202, Ray. 75." Now the words in this case are, "He had defrauded his creditors, and he has been horsewhipped off the course at *Doncaster*." These words have no reference or bearing upon the defendant's character, as an attorney, or in any other profession. It is contended for the plaintiff, that these words have a natural tendency to injure him in his character of an attorney; that is true, but the same may be predicated in any case where words of abuse are uttered. This case falls within the principle laid down in *Ayre v. Craven* (k), and therefore the judgment must be arrested.

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PARK, J.—I have always considered the principle laid down in Comyns's Digest to be correct. Here the words are alleged to have been spoken by the defendant, of and concerning the plaintiff in the way of his profession, but the jury have negatived that allegation. That being so, there are words of great abuse used by the defendant; but not so severe as in many of the cases mentioned, by Lord Denman, in the judgment in *Ayre v. Craven* (k). There it is said, "Some of the cases have proceeded to a length which can hardly fail to excite surprise: a clergyman having failed to obtain redress for the imputation of adultery (m), and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution (n); such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay."

VAUGHAN, J.—I am of the same opinion. When the jury found that these words were not spoken of the plaintiff as an attorney, the defendant was entitled to a verdict.

COLTMAN, J.—I am of the same opinion. The only case cited, which seems to me to support the argument for the plaintiff, is *Stanton v. Smith* (o), but that is a solitary case, at variance with previous and subsequent decisions.

Rule absolute, to arrest the judgment.

(k) 4 Nev. & Man. 220; 2 Ado. & Ellis, 2.

(m) *Parrat v. Carpenter*, Noy. 64, S. C. Cro. Eliz. 502.

(n) *Wharton v. Brook*, 1 Vent. 21.

(o) 2 Lord Ray. 1480.

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June 12.

## DELEGAL v. HIGHLEY.

1. In an action for causing a malicious charge of fraud to be made against the plaintiff before a magistrate, the defendant pleaded that he caused the charge to be made upon and with a reasonable and probable cause; and then the plea proceeded to state what that reasonable and probable cause was, and certain facts and circumstances were stated; upon special demurrer, the plea was held bad, on the ground that it was not expressly stated that the defendant had the knowledge of the facts and circumstances at the time when the charge was made.

2. It is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms, strictly and properly, the legal proceedings; and a remark made by the clerk to the magistrate, forms no part of the proceedings which may be published.

3. In an action for publishing a libel, which stated that the defendant had been charged with a fraud before a magistrate, the only justifications which the law admits, are, first, that the charge itself was a true charge; or, secondly, that the publication contained a true, full, and faithful account of proceedings in a court of justice; and if such proceedings are published, the terms of the accusation should be stated, not merely the result of it; because, if the terms in which it was preferred were stated, it might carry with it, its own refutation or explanation.

**DEMURRER.**—The declaration stated that the plaintiff was a commission merchant, and had always conducted himself honestly, &c., yet the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to vex, harass, and oppress him, on the 24th day of *October*, 1835, falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured one *John Henley* to make before *Henry Winchester, Esq.*, at the *Mansion House*, in the city of *London*, the said *Henry Winchester* then being mayor of the said city, &c., a certain complaint, charge, and accusation, against the plaintiff, to wit, that he, the plaintiff, then improperly detained two blank bill-stamps, having the signature thereon respectively of the said *John Henley*, and that he the plaintiff had fraudulently obtained the said signature of the said *John Henley* to the said blank bill-stamps respectively: and thereupon the defendant then falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the plaintiff to be, and the plaintiff was thereupon summoned to appear, and did on such summons, to wit, on the 26th day of *October*, necessarily appear at the said *Mansion House*, to wit, to answer the matters of the said complaint, charge, and accusation: and thereupon, to wit, on the day last aforesaid, the defendant falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the said *John Henley*, to prosecute and continue the said complaint, charge, and accusation, before the said *Henry Winchester*, then being, &c., until the said *Henry Winchester*, then being, &c., to wit, on, &c., having heard and considered every thing that was alleged and said, touching the said complaint, charge, and accusation, wholly acquitted and discharged the plaintiff therefrom, and then dismissed the said summons; by means of which, &c.

The second count contained the usual introductory averments of character, and stated that the plaintiff had been summoned to the *Mansion House* on the charge made by *Henley*, as stated in the first count; yet the defendant, contriving and wickedly and maliciously intending to injure the plaintiff in his good name, &c., and to cause it to be suspected and believed, that he had been guilty of fraudulently obtaining the signature of one *John Henley*, to two blank stamped bills, and that he the plaintiff had been taken into custody on a criminal charge, in respect of such fraud and misconduct, and to vex, harass, oppress, impoverish, and wholly ruin the plaintiff; on the 27th day of *October*, falsely, wickedly, and maliciously, did compose and publish of and concerning the plaintiff, and of and concerning the said proceedings, a certain false, scandalous, malicious, and defamatory libel, containing the false, scandalous, mali-

cious, defamatory, and libellous matter following, of and concerning the plaintiff, and of and concerning the said proceedings of and before the said *H. Winchester*, that is to say,

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"**POLICE. Mansion House.**—On Monday, *Charles Delegal*, Irish provision agent, 39, *Clement's Lane, Lombard Street*, was charged, before the lord mayor, with having fraudulently obtained the signature of *John Henley*, a youth under twenty years of age, to two blank stamped bills. *Mr. Flower* stated the case to his lordship, and called *John Henley*, who said he was induced by *Delegal* to come from *Manchester*, to attend in a shop *Delegal* was about to open in the *New Cut, Lambeth*. After he had been a few days in town, he was desired by *Delegal* to go to his counting-house, in *Clement's Lane, Lombard Street*, where some papers were given him to copy; *Delegal* then placed before him two pieces of paper, in which he desired him to write his name across, which he did, thinking *Delegal* wished it as a specimen of his handwriting; but when *Delegal* removed them, he then saw the stamps which had been hidden under some other papers. He had since asked *Delegal* about them, but received evasive answers. *Charles Delegal* produced several letters which the lord mayor refused to look at. He then stated that one was only a memorandum which had been destroyed, and produced a mutilated portion of it with the name of the complainant written on it; the other was a bill which had likewise been destroyed; and called *Russel*, who swore that he saw the bill destroyed a week ago. *Mr. Hobler, the chief clerk, observed, that it was exceedingly improper, under any circumstances, to obtain the signature of the complainant, a mere boy, to bills of exchange.* The Lord Mayor said, that as it had been shewn that both the bills had been destroyed, the complainant need be under no further apprehension, and *Delegal* was discharged."

**Pleas**—To the first count, the defendant pleaded, secondly, that he caused and procured the said *John Henley*, to make before the said *Henry Winchester, Esq.*, the said complaint, charge, and accusation against the plaintiff, in the said first count mentioned, and caused and procured the plaintiff to be summoned to appear at the said *Mansion House*, and the said *John Henley* to prosecute, and continue the said charge, complaint, and accusation, upon and with a reasonable and probable cause; that is to say, because, therefore, to wit, on the 1st day of *August, 1835*, the said *John Henley*, being a son of the sister of the wife of the plaintiff, who was also a sister of the wife of the defendant, had agreed with the plaintiff to become a shop-boy, in a certain shop of the plaintiff's, to wit, in the parish of *Lambeth*, in the county of *Surrey*; he the said *John Henley*, being then under the age of twenty years; and afterwards, to wit, on, &c., he the said *John Henley*, so being such shop-boy of the plaintiff, and under twenty years, at the request of the plaintiff, went to his counting-house, being in *Clement's Lane, Lombard Street*, in the city of *London*, and so being in the said counting-house, the plaintiff then placed before him, the said *John Henley*, two slips of blank paper, and then desired him, the said *John Henley*, to write his name across, without acquainting him with the purpose thereof; and the said *John Henley* did, then being such shop-boy, and under the age of twenty years as aforesaid, at the said request of the plaintiff, write his name across the said slips of blank paper respectively, he, the said *John Henley*, then being ignorant that the said slips of blank paper were stamped, and thinking



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that the plaintiff wished only to see a specimen of the handwriting of him, the said *John Henley*; that the said slips of blank paper, at the time when the said *John Henley* so wrote his name across them as aforesaid, were severally stamped as bills of exchange, with certain stamps of our lord the *King*; but that the said *John Henley* did not, nor could at the time he so wrote his name as aforesaid, know of or see and observe the said stamps, because they were hidden by certain other papers when the said slips of paper were so placed before him by the plaintiff as aforesaid; that afterwards, to wit, on, &c., the said *John Henley* requested the plaintiff to inform him what the said slips of paper were, but the plaintiff did not, nor would then, or at any time before the making of the said charge and complaint, comply with the said request of the said *John Henley*, or any part thereof; that afterwards, to wit, on, &c., one *Harriet Henley*, being the mother of the said *John Henley*, requested the plaintiff to inform her what the said slips of paper were, but the plaintiff did not, nor would then, or at any time before the making of the said charge and complaint, comply with the said request of the said *Harriet Henley*, or any part thereof; wherefore the defendant saith, that he had reasonable and propable cause to believe, and did believe, that he, the plaintiff, before and at the time of making of the said charge and complaint, improperly detained the said two blank bill-stamps, having the signature thereon respectively of the said *John Henley*; and that he, the plaintiff, had fraudulently obtained the signature of the said *John Henley*, to the said blank bill-stamps respectively. Conclusion with a verification.

*Fourth plea*, to the second count—Except as to so much of the said count as charged, that the defendant composed and published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody on a criminal charge;—that before the composing and publishing of the libel in the said second count mentioned, to wit, on, &c., the plaintiff was charged before the said *Henry Winchester*, so then being lord mayor as aforesaid, with having fraudulently obtained the signature of the said *John Henley*, being a youth under twenty years of age, to two blank stamped bills; that upon the said charge, one Mr. *Flower* did then state the case to the said lord mayor, &c. (The plea then alleged, that all the circumstances mentioned in the libel, occurred during the investigation before the lord mayor.) And the defendant further saith, that he composed and published the said libel without malice, and that the same contains a true and full account of all that which took place before the said lord mayor, touching the said charge and complaint, without any suppression, alteration, omission, or misrepresentation whatever; therefore, he, the defendant, composed and published the said libel in the said second count mentioned, as he lawfully might, for the cause aforesaid. Conclusion with a verification.

*Fifth plea*—As to so much of the said second count as related to composing and publishing a certain part of the said libel, with intent to injure the plaintiff in his good name, fame, and credit, that is to say,

“POLICE. *Mansion House*.—On Monday, *Charles Delegal*, Irish provision merchant, 39, *Clement's Lane*, *Lombard Street*, was charged before the lord mayor, with having fraudulently obtained the signature of *John Henley*, a youth under twenty years of age, to two blank stamp bills.”

That before the composing and publishing of the said libel, to wit, on, &c.,

the said plaintiff was charged before the said lord mayor, at the *Mansion House*, with having fraudulently obtained the signature of the said *John Henley*, then being a youth under twenty years of age, to two blank stamped bills, wherefore the defendant composed and published the libel in the introductory part of this plea and the said second count mentioned, as he lawfully might, for the cause aforesaid. Conclusion with a verification.

*Sixth plea*, to the second count of the declaration; except as to so much of the said count, as charged that the defendant composed and published the libel therein mentioned, intending to cause it to be believed, that the plaintiff had been taken into custody on a criminal charge;—that before the composing and publishing of the said supposed libel, in the said second count of the declaration mentioned, to wit, on, the 1st day of *August*, in the year of our Lord, 1835, the said plaintiff did fraudulently obtain the signature of the said *John Henley*, &c.; that the plaintiff was charged, before the said lord mayor, with having fraudulently obtained the signature of the said *John Henley*, to the said two pieces of paper so stamped as last aforesaid; and on the said charge, the said *Mr. Flower* did state the case to the said lord mayor, &c. (The plea then proceeded to allege the truth of all the statements contained in the libel,) wherefore the defendant did compose and publish the same libel, in the said second count mentioned, as he lawfully might, for the cause aforesaid. Conclusion, with a verification.

*Demurrer*—to all the pleas, on several grounds, and *joinder*.

The points marked for argument by the plaintiff were—To the *second plea*, that it did not shew that the plaintiff was guilty, or that the defendant had reasonable cause to believe he was guilty; or that the defendant knew of the circumstances stated in the plea, as being reasonable and probable cause; that the plea was too general; that it amounted to the plea of not guilty; and that it improperly concluded with a verification.

To the *fourth plea*—That it improperly attempted to exclude the consideration of the intent of the libel, from the question as to the justification of it; and that it did not sufficiently deny or confess and avoid the libel as charged; that it was a plea to the whole declaration, though, in the introductory part thereof, it was pleaded as to part only; that the plea did not justify the whole matter to which it was pleaded; that it was no justification in law for the publication of a libel, that the publication complained of, stated only what had actually taken place on a hearing before a police magistrate; that the account was manifestly coloured and untrue; and that no justification, by reason of any right of the public to information, or otherwise, was shewn.

To the *fifth* and *sixth pleas*, similar objections to the last-mentioned, were stated; and to the *sixth plea*, it was further objected, that the truth of the imputation, that the plaintiff did obtain the signatures as stated, was no justification for stating that the plaintiff had been charged therewith before the lord mayor, and the charge heard, &c., and that the plea was double and contained superfluous matter.

The arguments of counsel, are stated upon those points only, which were determined by the Court.

*Henderson*, in support of the demurrer, relied upon the objections already mentioned.—As to the second plea, it does not disclose any reasonable or pro-

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bable cause for preferring the charge against the plaintiff, because it was quite consistent with every thing which is stated in the plea, that the defendant had no knowledge of any of the circumstances of the case, until after he had preferred the charge. A contemporaneous knowledge ought to have been shewn, so that it might appear, that the defendant had reasonable and probable cause at the very time when he made the charge; and he ought also to have stated the facts and circumstances upon which he relied, as amounting to reasonable and probable cause.

*E. V. Williams, contrà.*—The second plea discloses circumstances which are sufficient to shew, that the defendant had reasonable and probable cause for making the charge; and although the same facts might have been proved, under the plea of not guilty, there are abundance of authorities to shew that this is not a ground of demurrer. If the plaintiff objected to the second plea on this ground, an application ought to have been made to a judge at chambers, to strike out one of the pleas. Nor was it necessary that the defendant should believe, that the plaintiff was guilty at the time he made the charge. It is not required that a party should have a conviction of the guilt of another in his mind, when he makes a charge against him. It is sufficient if the facts would raise such a suspicion in the mind of a reasonable man, as would fairly induce him to put the case in the course of a criminal inquiry. In many cases, charges are investigated with a laudable and innocent intention. But the question, whether it is necessary to aver that the defendant had the knowledge of the facts when the charges were made, does not arise in this case; because in the plea, the facts are alleged to have taken place in *August*, and the declaration avers that the charge was made before the lord mayor, in *October*. In the plea, the defendant alleges that he prosecuted the complaint "upon and with a reasonable and probable cause, that is to say, because, theretofore, to wit, on the 1st day of *August*, the said *John Henley*, being a son, &c." It must be taken, therefore, that the cause preceded the effect. That the parties are bound by the dates which are stated in the pleadings, appears by *Owen v. Waters (a)*.

*Henderson* was heard in reply.

*Cur. adv. vult.*

*TINDAL, C. J.*—The first count in the declaration is framed in the usual form, for causing and procuring a false and malicious charge to be made against the plaintiff before a magistrate, and proceedings to be taken thereon, without any reasonable or probable cause. The second plea which is pleaded to that count only, alleges, in terms, that the defendant caused and procured the charge to be made, "upon and with a reasonable and probable cause," and then proceeds to state what that reasonable and probable cause was; and in so doing, alleges the several facts and circumstances attending the transaction out of which the charge before the lord mayor arose. To this plea there is a special demurrer, alleging, as one ground of objection, that it contains no allegation that the defendant, at the time he caused the charge to be made, had been informed of, or knew, or in any manner acted on, those facts and circumstances. And we

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are of opinion that the plea is bad, not in form only, but in substance, on this ground of objection. The gravamen of the declaration is, that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time; and, under the plea of not guilty, the plaintiff must have failed at the trial, if he had not proved that the facts of the case had been communicated to him; or at all events, so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt, in the mind of any reasonable man, previous to the charge being laid before the magistrate. This was held by the Court of King's Bench, in the course of last term, upon a motion for a new trial, in a case of *Docwra v. Hilton*. And if the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the Court in a plea of justification, it is obvious that he must allege as a ground of defence, that which is so important in proof under the plea of not guilty, viz.—that the knowledge of certain facts and circumstances, which were sufficient to make him, or any reasonable person, believe the truth of the charge which he instituted before the magistrate, existed in his mind, at the time the charge was laid, and was the reason and inducement for his putting the law in motion. Whereas it is quite consistent with the allegations in this plea, that the charge was made upon some ground, altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavours to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge, for the first time, since the charge was made. Upon this ground, we hold the second plea to be insufficient in law. The second count of the declaration is for the composing and publishing of a false and malicious libel; the libel consisting of the publication in a newspaper of a police report of the same proceedings, before the lord mayor, which form the subject matter of the first count. And the fourth and sixth pleas are each pleaded to the second count, “with the exception of so much of the count as charges that the defendant composed and published the libel therein mentioned, intending to cause it to be believed, that the plaintiff had been taken into custody upon a criminal charge.” To this plea, various objections have been assigned for cause of special demurrer, and have been urged in argument before us. We think, however, an objection appears upon the face of the plea, which renders it unnecessary for us to give any opinion, either upon the formal objections which have been urged against its validity, or on the more general question which has been raised, viz.—whether the publishing of a fair and correct account of proceedings *ex parte*, upon a charge before a magistrate, is or is not, a privileged publication. For each of these pleas alleges as a ground of justification, “that the supposed libel contains a full and true account of all that took place before the lord mayor, touching the said charge or complaint.” But it is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms, strictly and properly, the legal proceedings. The principle is so laid down in the case of *Lewis v. Clement (b)*, and in other cases. But in the libel set out in the declaration, after the statement of the evidence given before the lord mayor, an observation is inserted of Mr. *Hobler*, the chief clerk, “that

(b, 3 B. & Ald. 702.

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it was exceedingly improper, under any circumstances, to obtain the signature of the complainant, a mere boy, to bills of exchange." This appears to us to be a substantive reflection on the character and conduct of the plaintiff, which is altogether unwarranted, in two respects; it was not made in the course of any judicial proceeding, by any one whose duty called upon him to make it; it was uttered by a person who, for this purpose, must be considered as an entire stranger, it is the same as if made by any bystander in the court. Again, it was not warranted by the facts which were brought in evidence against the plaintiff, which amounted not to a charge of obtaining signatures to blank bills of exchange, but to a charge of obtaining the signature of a young man, to two blank pieces of paper which had been stamped with stamps, for bills of exchange. The libel, therefore, contains a serious reflection on the character of the plaintiff, which the privilege set up in the fourth plea, supposing it to exist, does not extend to justify,—a reflection, the truth of which is not justified by the facts stated in the sixth plea; and on those grounds, we think both these pleas are bad. The fifth plea is pleaded to the publication of a certain part of the libel, which is thereby separated and divided from the rest; namely, that part which states that the plaintiff was charged, before the lord mayor, with having fraudulently obtained the signature of a youth, under twenty years of age, to two blank stamped bills, with the intent to injure the good name and reputation of the plaintiff. There can be no doubt, but that the publication of the fact, that such an accusation was made against the plaintiff, is calculated to injure him in his good name and reputation, and that the defendant is therefore called upon to justify such publication; and the only justifications which the law admits, to the publication of an accusation of this nature, are two; first, that the accusation against the plaintiff was founded on facts, which make the charge itself a true charge; and secondly, that the publication was justified by the occasion, viz.—that it is a true, full, and faithful account of proceedings in a court of justice. The plea in question sets up neither of these grounds of defence. It is merely an assertion that an accusation was made by some third person, reflecting on the character of the plaintiff. Even whilst the *Earl of Northampton's* case (c) was held to be law to its full extent, the repetition of a slander by a third person was no justification, unless the party gave the plaintiff a ground of action against such third person, by naming the original author of the slander at the time; nor, it would seem, unless he averred in his justification, his belief that the accusation was true; per *Bayley, J.*, in *Macpherson v. Daniel* (d). But the case of *De Crespigny v. Wellesley* (e), furnishes an authority that this doctrine does not extend to the publication of a written libel; and that where such libel consists in publishing the fact of an accusation having been made against another, the defendant must shew the accusation to be true. The justification in the present case, in fact, amounts to no more than a republication of the libel itself. If the libel is to be taken as containing a publication of legal proceedings—as might be surmised from the whole of the libel as stated in the declaration—then the plea is bad, because it omits to state that it is a true and accurate report, containing the whole of what passed on that occasion. The terms of the accusation should be stated, not merely the result of it; for if the terms in which it was preferred were stated, it might carry with it, its own refutation or explanation. (See *Saunders v. Mills* (f).

(c) 12 Rep. 134.

(d) 10 B. &amp; C. 270.

(e) 5 Bing. 405.

(f) 6 Bing. 213; 2 M. &amp; P. 529.

*Flint v. Pike* (g), *Smith v. Thomas* (h.), and still further, it appears on this very record, that the libel justified is, in fact, a part of a legal proceeding only, viz. the charge; which the defendant is not justified in publishing alone. (See *Rex v. Lee* (i), *Rex v. Dicken* (k).) We, therefore, think the fifth plea bad also; and upon the several pleas above demurred to, we give our

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Judgment for the plaintiff.

(g) 4 B. & C. 473.

(h) 2 New Cases, 372; 1 Hodges, 333.

(i) 5 Esp. 123.

(k) 2 Camp. 563.

YAPP, Assignee of PARTINGTON, an Insolvent, v. HARRINGTON.

June 9.

TROVER to recover certain goods belonging to the insolvent, which were sold by the sheriff, under a writ of *fi. fa.*, issued by the defendant. At the trial, before *Patteson, J.*, at the last summer assizes for *Worcester*, the following appeared to be the facts of the case. On the 6th April, 1833, the insolvent gave the defendant a warrant of attorney for 300*l.*, and in *Trinity Term*, 1835, judgment was signed; an execution issued, and the amount of the debt and costs was levied under a *fi. fa.*, by a sale of the goods which took place on the 5th and 6th November. On the 5th November, the insolvent was arrested, at *Cheltenham*, on mesne process, under a warrant which was directed to one *Surman*, and his assistants. After the arrest, *Surman* gave the insolvent into the custody of *Jokason*, his assistant, by whom he was taken to a beer-house, where he remained in the custody of *Jokason*; but he was frequently left to the care of one *Newman*, a friend of the sheriff's officer; and on several occasions, he was allowed to walk about the town, in *Newman's* company. The insolvent remained in custody, under these circumstances, until the 12th November, when he was taken to *Gloucester* gaol by the sheriff's officer. On behalf of the plaintiff it was contended, that the sale of the goods, on the 5th and 6th November, was void, under the 7 Geo. 4, c. 57, sec. 34, which enacts, that no person shall, "after the commencement of the imprisonment" of a prisoner, avail himself of any execution, issued upon any judgment. On the other hand it was alleged, that the case was not within this section, because the imprisonment of the insolvent did not commence until the 12th November, when he was taken to prison. The learned judge refused to nonsuit the plaintiff, but left the case to the jury, directing them to find whether, after the arrest, and before the insolvent was taken to prison, he was in the custody of the sheriff's officer. The jury found that the insolvent was not in the custody of the sheriff's officer, but of a friend of the sheriff's officer. Verdict for the defendant.

By the general Insolvent Act 7 Geo. 4, c. 57, sec. 34, it is enacted, that no creditor shall, after the commencement of the imprisonment of a prisoner, "avail himself of any execution, issued or to be issued." —*Held*, that where an actual imprisonment within the walls of a prison, follows upon an arrest for debt, as one continuous act, within the usual time allowed and required by law, then the arrest must be taken to be the commencement of the imprisonment; but where, after the arrest is made, any delay, not sanctioned by law, takes place before the actual commitment to prison, such as by the favour of the plaintiff, or the negligent or permissive escape of the prisoner; then not the arrest,

In *Michaelmas Term*, *R. V. Richards* obtained a rule nisi, to set aside the verdict, and to enter a verdict for the plaintiff.

but the actual coming within the walls of a prison, is the commencement of such imprisonment.

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*Talfourd*, Serjt., and *Busby*, shewed cause.—The sale of the goods took place before the commencement of the insolvent's imprisonment, and therefore, the defendant was entitled to the verdict. It is clear, under the 10th section of the statute, that no person is entitled to present a petition for his discharge, unless he is "in actual custody within the walls of any prison," and by the 12th section it is provided, that the act shall not extend "to any person who shall not be at the time of filing his or her petition, and during all the proceedings therein, in actual custody within the walls of the prison, without any intermission of such imprisonment by leave of any court or otherwise." The words "after the commencement of the imprisonment of such prisoner" in the 34th section, have reference to the same species of imprisonment as the former sections; or, at all events, to a lawful imprisonment in the custody of the sheriff. But here, the insolvent was not in any continuous lawful custody. The sheriff's officer was not authorized to keep the insolvent at a beer-house, from the 5th until the 12th of *November*; or to give him into the custody of *Newman*, who is expressly found not to be the bailiff's assistant; and the sheriff was clearly liable to be sued for an escape. The 30th and 31st sections of the statute will be relied on by the other side, because the words there used are, "at the time of his arrest, or other commencement of such imprisonment." But that only shews, that in some cases the arrest may be the commencement of the imprisonment; and it is a strong argument in favour of the defendant, that if such a construction was intended in the 31st section, the same words would have been used. In *Tribe v. Webber* (b) it is said, that where A. being arrested puts in bail, afterwards he surrenders in discharge of his bail, and is above two months in prison, he is a bankrupt only from the time of his surrender, not from the time of his arrest. *Barnard v. Palmer* (c) is to the same effect. In *Sims v. Simpson* (d) it was decided that, under the Insolvent Debtor's Act, there is not that relation to the first day of the insolvent's imprisonment, that there is, under the late Bankrupt Act, to the act of bankruptcy.

*R. V. Richards, contrà*.—The object of the 34th section is, that the property of a person who is about to take the benefit of the statute, shall be fairly divided amongst his creditors. By the 10th section, a person within the walls of a prison, may apply by petition for his discharge within fourteen days after the commencement of his actual custody; but the words "within the walls," are expressly introduced to prevent debtors who were merely within the rules of the prison, from taking the benefit of the act. It is not contended, if, as was done in the cases cited, a debtor is arrested and gives bail, that the arrest may then be considered as the commencement of an imprisonment; but it was the intention of the legislature, when a man's affairs were so embarrassed as to prevent him from obtaining bail, that his property should then be fairly distributed. The 30th, which is the key to the subsequent sections, shews very clearly that the commencement of the imprisonment must be considered with reference to the time of arrest. It enacts, that if any person who shall petition the court for his discharge from imprisonment, under the act, "should, at the time of his or her arrest, or other commencement of such imprisonment," have goods in his possession, they shall be treated as being his property. So

(b) Bull. N. P. 38.

(c) 1 Camp. N. P. C. 509.

(d) 1 Bing. N. C. 306; and see *Gye v. Hancock*, 4 Ado. & Ell. 58.

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by the 31st section, certain distresses for rent are not available, when made "after the arrest or other commencement of the imprisonment" of the insolvent. The arrest was lawfully and properly made, otherwise the sheriff could not be liable to be sued for an escape; and it must be taken that the imprisonment commenced at the time of the arrest. And admitting, for the sake of argument, that for a day or two the insolvent was not in the custody of the sheriff, then as the plaintiff was not a party to the irregularity, and as the arrest was clearly lawful, the plaintiff ought not to suffer from the wrongful act of a third party. Another point which may be contended is, that although a bailiff must be expressly named in the warrant, he may, after he has legally arrested the party, lawfully give him into the custody of an assistant.

*Cur. adv. vult.*

TINDAL, C. J.—The principal question raised in this case for our consideration turns upon the proper construction to be put upon the 34th section of the General Insolvent Act, which limits the time after which no one shall avail himself of any execution, upon a judgment signed under a warrant of attorney, or a *cognovit actionem* given by a prisoner who petitions under that statute. The words of that section are, that no person shall avail himself of such execution "after the commencement of the imprisonment of such prisoner." On the part of the plaintiff it is contended, that the arrest of the debtor is, within the meaning of this section, the commencement of his imprisonment. On the part of the defendant it is, on the other hand, contended, that looking at the whole act, "the commencement of his imprisonment" is the first moment of the debtor's being actually committed to the walls of the prison, from which moment his right to petition under the statute takes its commencement. If the answer to this question had depended upon the 34th section alone, there would have been little difficulty in the case. The words themselves, in their natural sense, import the being actually in prison; and such construction of the word "imprisonment" appears to be warranted by reference to the 10th section of the act, which describes the persons who shall be capable of taking the benefit of the act, as "persons in actual custody within the walls of any prison," and still more by reference to the 12th section, which expressly enacts, that the statute shall not extend to any person "who shall not be, at the time of filing his petition, and during all the proceedings thereon, in actual custody within the walls of the prison, without any intermission of such imprisonment." And it is a further argument in favour of this construction of the section, that the actual imprisonment of the debtor within the walls of the prison, is a fact that may well be presumed to be notorious to his creditors, after which any creditor holding a warrant of attorney must be considered as taking proceedings thereon at his own peril; whereas the precise time of the actual arrest of the debtor, may be often a fact involved in obscurity and uncertainty. The difficulty, however, arises from the introduction of the word "arrest" in sections 30 and 31. The 30th section, (which contains the provision as to the insolvent having goods in his possession, order, or disposition, by the consent of the true owner,) begins by enacting, that if any person who shall petition for his discharge from imprisonment under the act, "shall, at the time of his arrest, or other commencement of such imprisonment," by the consent of the true owner, have in his possession, &c. And the plaintiff contends, and we think



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justly contends, that the statute does in this instance expressly declare, that the arrest of a prisoner is one of the modes by which his imprisonment may be commenced. And again, the 31st section gives room for the same observation, as it contains provisions with respect to distresses for rent made "after the arrest or other commencement of the imprisonment of any person who shall petition under the act." That in each of these two sections, and for the purposes contained in these sections, the arrest of the prisoner is made the limit of time after which certain consequences, therein respectively specified, are to follow, must, we think, be admitted; nay, further, it must be admitted also, that the arrest of the prisoner is one of the modes by which his imprisonment may be commenced for the purposes of these sections. Whether the insertion of the word "arrest," as one of the modes of the commencement of the imprisonment of the debtor, in the 30th and 31st sections, and the omission of that word in the 34th, the section now under consideration, arose from inaccuracy, or from any intended distinction with respect to the subject-matter in those respective sections, may be the subject of some doubt, though it certainly is very difficult to see any reason for any such intended distinction. And, upon the whole, we think the proper construction of these sections is, that where the actual imprisonment within the four walls of the prison follows upon the arrest, as one continuous act, within the usual time allowed and required by law and the course of practice, there the arrest shall be taken to be the commencement of the imprisonment; but where, after the arrest is made, any delay, not sanctioned by the due course of law, takes place before the actual commitment of the defendant to prison, such as by the favour of the plaintiff, or the negligent or permissive escape of the prisoner, or any other cause of the same nature, there, not the arrest, but the actual coming within the walls of the prison, is, within the meaning of the statute, the commencement of such imprisonment. For we think great uncertainty might arise as to the right of creditors and the validity of transactions, honest in themselves, if they were made to depend upon the happening of events of which the creditors had no notice; and in the particular case, it would seem to be unreasonable, that an execution under a warrant of attorney, for any thing that appears to the contrary, given *bond fide* and for a valuable consideration, should be held to be voidable where it was completed before the actual imprisonment of the debtor, because such execution was not executed until after the original arrest made, in a case where the insolvent was not committed to actual imprisonment in the county gaol, until after an unreasonable and unjustifiable delay. And this circumstance it is which appears to us to distinguish the present case from that of *Stevens v. Jackson* (a) and others, in which case the delay of a week between the arrest of the bankrupt in his own house, and his committal to prison, was accounted for "by his having been arrested in bed dangerously ill and incapable of being removed," during all which interval the bailiff's follower kept the key of his house. Such a delay may well have been considered as reasonable under the circumstances; the duty of the officer, as observed by Mr. Justice *Heath*, even where the prisoner is taken in execution, being only to carry him to prison "within reasonable time." But, in the present case, the arrest of the insolvent at *Cheltenham* takes place on the 5th of *November*, and the commitment to *Gloucester* gaol is delayed until the 12th, and in the interval it is expressly

(a) 1 Marsh. 469.

found by the jury that he was in custody, "not of the sheriff's officer, but of a friend of the sheriff's officer," without any excuse suggested for the delay. We cannot, therefore, consider this intervening imprisonment as a legal imprisonment continuing from the first arrest; and on that account we think the arrest was not, in this case, the commencement of the imprisonment, within the meaning of the act; and that, the execution having been completed before the insolvent was actually committed to the county gaol, it is not avoided under the 34th section, as an execution after the commencement of the imprisonment of the insolvent.

Rule discharged.

### SCOTT v. MILLER.

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May 23.

**A**SSUMPSIT for money had and received by the defendant, to the use of the plaintiff. *Plea*—Non-Assumpsit. At the trial, before *Tindal*, C. J., at the *London* sittings, the following appeared to be the facts of the case. The plaintiff was the owner of the ship *Countess Dunmore*, and the defendant had been employed as captain, on a foreign voyage. A dispute having arisen respecting the ship's accounts, and respecting a claim of primage by the defendant, which the plaintiff resisted, the present action was brought. Amongst other evidence, the plaintiff offered to prove the payment of a bill of exchange for 137*l.* 1*s.* 6*d.*, which had been drawn by the defendant at *Rio de Janeiro*, upon Mr. *Halket*, the plaintiff's agent in *London*, whilst the vessel was there, undergoing some repairs. It appeared that the vessel had been obliged to put into *Rio*, in consequence of having received damage at sea, and that she remained there for some days, whilst under repair. The following is a copy of the bill:—

"*Rio de Janeiro*, the 12th *August*, 1833, for 137*l.* 1*s.* 6*d.* At fifteen days' sight, pay this first of exchange to the order of Messrs. *Hudson, Weguelin*, and Co., the sum of one hundred and thirty seven pounds, one shilling, and sixpence, sterling, value in disbursements of Bk., *Countess Dunmore*, which place to account as per advice.

"To Mr. *David Halket*,  
"19, St. *Helen's Place*."

"*John Miller*."

In an action for money had and received, brought by a ship-owner against his captain, the plaintiff offered evidence of the payment of a bill of exchange drawn by the defendant in a foreign port, in favour of a broker, on account "of disbursements for the ship." There was evidence that the ship had undergone some repairs in the port. *Held*, that proof of the payment of the bill was inadmissible in this form of action, in the absence of evidence that the money had ever come to the defendant's hands.

Messrs. *Hudson, Weguelin*, and Co. were brokers at *Rio*, but there was no evidence to shew that they had been employed to repair the vessel. No letter of advice was produced. It was objected, on behalf of the defendant, that this evidence was inadmissible in an action for money had and received, because there was nothing to shew that the money for which the bill was given, or any part of it, ever came to the defendant's hands. The learned judge received the evidence, and the jury found a verdict for the plaintiff, for 125*l.*

*Wilde*, Serjt., obtained a rule *nisi* for a new trial, on the objections which were taken at the trial. He contended, that, as there was evidence to shew that the plaintiff's vessel had been repaired at *Rio*, the necessary inference was,

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that the bill had been drawn for the purpose of meeting the necessary expenses of the vessel (a).

*Bompas, Serjt., and Whateley*, shewed cause.—It is evident that the defendant received value for the bill of exchange, and that it was drawn on account of the ship's disbursements. He is, therefore, bound to shew how he has expended the money. It does not appear that the whole amount of the bill was expended in repairing the vessel; and the fact that the payees are brokers, shews that it could not have been given on account of the repairs. The defendant has followed the usual mode of raising money, in a foreign port in which the ship-owner has no regular agent. But for this purpose the payee ought to be treated as the ship-owner's agent, who has advanced money; and by paying the bill, the plaintiff has recognized the agency. If the defendant's excuse is, that the money has been disbursed in repairing the ship, then he ought to shew that the repairs were done. A ship-owner is only liable for necessary repairs; and, therefore, the defendant ought also to shew that they were necessary. *Rotcher v. Busher* (b), *Palmer v. Gooch* (c), *Bogle v. Atty* (d), *Thacker v. Moates* (e). If it should be decided that the captain of a ship is not bound to shew how the money has been disbursed under such circumstances as these, then the owners may be sued by the parties who repaired the ship, and so be compelled to pay twice. [*Tindal, C. J.*—What evidence is there that the bill had ever been converted into money by the defendant? It is drawn on account of the ship's "disbursements," and is duly paid by the plaintiff when it is presented.] In strictness, the plaintiff was not bound to pay the bill; but the practice of paying such bills has prevailed, for the general convenience of ship-owners. The defendant is bound to shew how the amount has been disbursed, and he will suffer no injustice if he is compelled to do so; because, if the money was properly expended, he will be allowed to pass the amount to his credit, in the accounts.

*Wilde, Serjt., and Cleasby*, in support of the rule.—It appears by the cases which have been cited, that the owners of a ship are liable to pay for necessary repairs, and also for other disbursements. This bill is drawn on account of the ship's disbursements, and the amount having been paid by the plaintiff, it is evident he did not consider that the defendant had exceeded his authority; and even if the defendant has acted improperly, he may be liable in another form of action. The objection is, that the proof of the payment of this bill, is not evidence in an action for money had and received. In *Case v. Roberts* (f), it was decided, that an action for money had and received would not lie to recover back a sum paid upon trust for a specific purpose, unless it was first shewn that the trust was closed, and that a balance remained in the hands of the trustee. And in *Harvey v. Archbold* (g), it is said, that in this form of action the plaintiff must give evidence of a particular sum to which he is entitled. Here there is evidence that the ship was repaired at *Rio*, and that other charges were incurred, but there is nothing to shew that any part of the

(a) The rule was also granted upon a question as to the defendant's right to primage, but no judgment was pronounced on this point.

(b) 1 Stark. N. P. C. 27.

(c) 2 Stark. N. P. C. 428.

(d) 1 Gow. 50.

(e) 1 Moo. & Rob. 79.

(f) Holt's N. P. C. 500.

(g) 3 B. & Cress. 626.

proceeds of the bill ever came into the defendant's hands. It is not sufficient to shew, by inference, that the money might have come into the possession of the defendant. In *Nightingale v. Devisme* (h), Lord Mansfield, C. J., held, that proof of a transfer of stock to the defendant, would not support an action for money had and received.

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TINDAL, C. J.—I think this case must be submitted to the consideration of another jury. The form of the bill of exchange implies that it was drawn on account of disbursements in respect of the plaintiff's ship; and we think there should have been some evidence that the money came to the defendant's hands. The plaintiff is not without a remedy, because he may sue the defendant for fraud or misconduct, if the circumstances of the case warrant such a proceeding. This rule must be made absolute.

PARK, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

(A) 5 Burr. 2589.

## The EAST INDIA COMPANY v. BAKER, Secretary to the East India Dock Company.

June 7.

THIS action was brought to recover from the *East India Dock Company* certain sums of money, which the plaintiffs contended ought to be repaid to them by virtue of the statute 43 Geo. 3, c. cxxvi., upon the *Thomas Grenville* and seven other ships, the property of the *East India Company*. The following case was submitted to the Court, by consent:—

The *East India Dock Act* provides for a return of dock-duties to such of the *E. I. Company's* ships as have completed "their regular number of voyages." *Held*, that this refers to the last voyage, being more than six, which is made by any ship.

The *East India Dock Company* was constituted by the statute 43 Geo. 3, c. cxxvi., (public and private act,) and was thereby empowered to make docks for the reception of *East India* ships.

By section 91 it was enacted, that there should be payable to the *East India Dock Company*, for every ship entering into and using any dock, &c., the several respective rates following, (that is to say,)

1. For every such ship, (except country ships, thereafter described,) entering inwards, and unloading her cargo in the said docks, and loading her cargo outwards in the said docks, the rate or sum of 14s. per ton, to be paid within ten days after such ship should be cleared inwards.

2. For every ship built in the *East Indies*, (called country ships,) and navigated by *Lascars*, entering inwards, and unloading her cargo in the said docks, and loading her cargo outwards in the said docks, the rate or sum of 12s. per ton; the last-mentioned rate being 2s. per ton less than the rate on other ships, in consideration of the expenses of and in the maintenance of the *Lascars*, whilst such country ships are unloading.

3. For every ship loading outwards in the said docks, being a new ship, or not having, upon her last arrival, unloaded inwards therein, the rate or sum of 4s. per ton, to be paid before such ship should depart from the docks.

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4. That in case any such *British* or other ship, having unloaded her cargo in the said docks, should remove before loading any cargo outwards, and should not load any cargo outwards, there should be allowed and returned in respect thereof the sum of 2*s.* out of such 14*s.* or 12*s.* respectively.

5. And that, in case such ship *should have completed her regular number of voyages*, or should not be continued in the *East India* trade, there should be allowed and returned in respect thereof, for the last voyage of such ship or vessel in such *East India* trade, the sum of 4*s.* out of every 14*s.* or 12*s.* respectively, to be repaid within one calendar month after such ship or vessel should be removed from the dock.

By section 99, power was given to reduce or discontinue all or any of the rates thereby granted and made payable, and also to advance or revive the same again, in such manner as to the *East India* Dock Company, should from time to time seem meet and expedient, so as the said rates, when so advanced or revived again, did not exceed the rates thereinbefore granted.

By section 63, all ships in the *East India* trade were required to unload at those docks, with certain exceptions; which privileges and restrictions, it was enacted by section 110, should not continue in force for longer than the term of twenty-one years, to commence on the day that any rate granted or made payable by this act for or in respect of any ship or vessel entering the said docks, should have been demanded or taken.

These exclusive privileges expired on the 2nd of *October*, 1827.

In pursuance of the power above-mentioned, an abatement was made in 1818, of 2*s.* per ton in the rates payable under the first clause of section 91; from which time the rates were received, with that abatement, until the expiration of the exclusive privileges above-mentioned, when an agreement was come to between the two companies, for the *East India* Dock Company to load and unload all the *East India* Company's own or chartered ships, and to perform certain other services for the *East India* Company, in consideration of an annual payment of 36,000*l.*, for the term of six years from the 3rd of *October*, 1827. No mention or allusion is made by this agreement to the return of any rate. This agreement was subsequently always acted upon.

The statute 9 G. 4, c. 95, (public and private,) passed *June* 19, 1828, intitled, "An Act to consolidate and amend several Acts for the further Improvement of the Port of *London*, by making Docks and other Works at *Blackwall*, for the Accommodation of *East India* Shipping," recites and repeals the statute 43 Geo. 3, c. cxxvi., but continues the *East India* Dock Company; and by sections 7 & 8 enacts, "that all contracts, covenants, agreements, engagements, and securities, which, at the time of the passing of this act, shall have been entered into, or given to or by the directors of the said company, under the authority of the said recited acts, shall continue, and may be enforced in the same manner as if the said recited acts had not been repealed; and that all debts, rates, damages, and other monies which, at the time of the passing of this act, shall have been owing to, from, or by them, and shall and may be sued for, recovered, and received, in the same manner as if the said recited acts had not been repealed." By s. 118, the *East India* Docks' Company are authorized to receive other rates, appointed by them, not exceeding 10*s.* per ton.

In explanation of the phrase, "regular number of voyages," mentioned in the clause on which the plaintiffs' claim is founded, it is requisite to state, that,

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by sec. 1 of the statute 39 Geo. 3, c. 89, (public act,) intituled, "An Act for regulating the Manner in which the United Company of Merchants of *England* trading to the *East Indies* shall hire and take up Ships for their regular Service," it is enacted, that, after the passing of that act, the said company shall employ in their regular service no ships but such as shall be contracted for, to serve the said company as they shall have occasion to employ them in trade and warfare, or any other service, for six voyages to and from *India* or *China* or elsewhere. At the time of the passing of this act, the usual period of a vessel's lasting in that trade, was the expiration of the performance of the voyages last-mentioned, when it was usually broken up, and the phrase "regular number of voyages," has from that time meant six voyages between *England* and *India* or *China*, and back again.

By the statute 43 Geo. 3, c. 63, (public act,) passed to explain and amend the last-mentioned act, by section 2, after reciting that it had been found that ships might be repaired and made fit to perform more than six voyages to and from the *East Indies*, in the service of the *East India* Company, it is enacted, that it shall and may be lawful to and for the court of directors to receive tenders for any ship or ships which have been or may be engaged in the service of the said united company, and to hire and take up such ship or ships for one or more voyage or voyages to and from the *East Indies* in the service of the said company, beyond and after the performance of the number of voyages for which any such ship or ships respectively had been or shall be contracted to serve the said company. This statute received the royal assent at the same session as the 43 Geo. 3, c. 126, but at a prior part of it.

The *Thomas Grenville* arrived from her sixth voyage, in the docks, in 1818, before the abatement of 2s. per ton was made, and then and previously paid under clause 1. She afterwards paid the reduced rate of 12s. per ton until the agreement above mentioned was made. This ship and all the others, continued in the trade until the time of passing the act 3 & 4 W. 4, c. 85, which put the company's right to trade in abeyance for twenty years.—Sec. 203.

The questions for the opinion of the Court as to her, are—

1. Whether the *East India* Docks' Company ought not to have returned and repaid 4s. per ton, under clause 5, on the expiration of her sixth voyage?

2. Whether, in addition to such return, she had not a right to a loading on her next subsequent voyage, free of dock charges; or, if not loaded outwards again, to a further return of 2s. per ton under clause 4?

3. If she had no such additional right, whether the *East India* Dock Company had a right to 4s. per ton, or 2s. per ton, or what other sum, for her loading in the docks for that next subsequent voyage?

The facts and questions respecting the other ships, were similar to those already stated.

*Spankie*, Serjt., (with whom was *Manning*.) for the plaintiffs.—The 39 Geo. 3, c. 89, must be referred to for the purpose of shewing the meaning of the words "regular number of voyages," which are used in the 91st section of the 43 Geo. 3, c. cxxvi. The former statute enacts, that the *East India* Company shall employ in their regular service no ships but such as shall be contracted for to serve for six voyages, to and from *India* or *China*; and it is found in the case that, at the time of the passing of the act, a vessel usually lasted for six voyages, after which she was broken up. The *Thomas Grenville* was, therefore, clearly entitled to a return of 4s. per ton on the sixth voyage.

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Sir *W. W. Follett*, (with whom was *Cowling*.) *contrâ*.—It is true that the 39 Geo. 3, c. 89, prevented the *East India* Company from sending a ship more than six voyages to *India* or *China*; and, in consequence of that restriction, it may be granted, that the term "regular number of voyages" had reference to the number of voyages allowed by that statute; but the 43 Geo. 3, c. 63, which removed this restriction, and allowed the *East India* Company to send a ship for more than six voyages, put an end to this construction; and the term must now be taken to mean the number of voyages beyond six, for which the ship may happen to be hired. And it is very important to remember, that when the Dock Act, 43 Geo. 3, c. CXXVI., received the royal assent, the 43 Geo. 3, c. 63, was in force, because it had previously received the royal assent. If, therefore, the statutes are to be referred to for the construction of the term, it certainly could not mean six voyages. The question is, whether, the *Thomas Grenville* having received all the benefits of the docks, inward and outwards, after she returned from her sixth voyage, the dock company are not entitled to full remuneration for the services performed? A reference to the statute, without considering extrinsic circumstances, will clearly shew that they are. The deduction under the 5th branch of the section is only to be made when a ship has completed her regular number of voyages, or, in other words, when she was to be broken up, as was formerly the case; or when she should cease to be continued in the *East India* trade. In either case it was contemplated that the ship had performed her last voyage in the *East India* service. But on the return of the *Thomas Grenville*, from her sixth voyage, she unloaded in the docks, and also took in a cargo for the seventh voyage; therefore she is not brought within the letter or the spirit of these words. [*Tindal*, C. J.—It is stated in the case, that, since the 39 Geo. 3, c. 89, "the phrase 'regular number of voyages' has from that time meant six voyages between *England* and *India* or *China* and back again." ] It was not intended that the question should be concluded by that statement. [*Tindal*, C. J.—It ought to have been found that this was the meaning of the phrase until the new statute was passed (a). I do not mean to say that the question is not still open.] If the argument on the other side should prevail, then if a ship is entitled to a return of 4s. per ton on her return from the sixth voyage, she would be also entitled to a similar deduction upon every succeeding voyage.

*Spankie*, Serjt., was heard in reply.

TINDAL, C. J.—The main and important question is the first which has been submitted to us; and when that is answered, the answers to the others seem to follow as a corollary. It is, whether the defendant ought not to have returned 4s. per ton to the plaintiffs, under the provisions of the Dock Act, when the *Thomas Grenville* returned from her sixth voyage. That question will depend upon the proper construction of the fifth clause in the 91st section of the act, which provides, "that, in case such ship should have completed her regular number of voyages, or should not be continued in the *East India* trade, there should be allowed in respect thereof, for the last voyage of such ship in such *East India* trade, the sum of 4s. per ton." The question then is,

(a) The Court intimated to the counsel for the plaintiffs that such an alteration should be considered to have been made; but *Spankie* declined to consent.

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what was the meaning of the term "regular number of voyages" at the time the act passed? Now, by a reference to the title and enactments of the 39 Geo. 3, c. 89, there can be little doubt but that, under that statute, it meant six voyages from *England* to *India* or *China*; and if there had been no alteration made down to the time when the Dock Act received the royal assent, I should have entertained no doubt but that six voyages were intended. But it appears, that about a month before the Dock Act was passed, a statute was made to amend the provisions of the 39 Geo. 3, c. 89, and both these statutes must now be construed together. The 43 Geo. 3, c. 63, after reciting the former statute, and that ships might be repaired and made fit to perform more than six voyages, enacts, that it should be lawful for the court of directors to hire ships for one or more voyages, after the performance of the voyages for which the ship had previously served. If the two enactments had occurred in one statute, I should have had no doubt that, by the latter, an extension of one or more would have been given to the number six; but here the intention of the legislature is manifest, because the addition to the former number is given in a separate act. I should therefore say, that the meaning of the words "regular number of voyages" does not mean six, but such an addition to that number, as the *East India* Company may engage the ship for. And the reason of the matter goes hand in hand with the strict reading of the law, because, on the return of the ship from her sixth voyage, if she were engaged for future voyages, the Dock Company would incur all the expense of unloading and loading, just as if she had returned from an ordinary voyage. A difficulty would also arise by any other construction as to what payment the ship should make on her seventh or subsequent voyages; for it would seem to be unreasonable to require the deduction on every voyage. I am, therefore, of opinion, that the *Thomas Grenville* was not entitled to a return of 4*s.* per ton on the completion of her sixth voyage. As to the second question, it is almost unnecessary to say, that she had not a right to a loading on her next voyage free of dock charges; and the third question becomes altogether useless.

PARK, J.—This question depends altogether on the meaning of the words which have been referred to, and equity goes along with the construction which they have received.

VAUGHAN, J.—I am of the same opinion. The return of the 4*s.* per ton is only to be made when the ship has returned from her last voyage in the company's service. That appears from the context, "or should not continue in the *East India* trade," meaning, if she should not then have been the regular number of voyages. Until the 43 Geo. 3, c. 63, made the number to depend upon the choice of the *East India* Company, it seems that six voyages were considered the regular number.

COLTMAN, J.—I am of the same opinion. It is true that the parties who claim the repayment of this money must clearly establish their title to it. The whole question arises on the meaning of the words "regular number of voyages." The case finds that the term means "six voyages;" but we are not bound by the popular meaning, if we find it inconsistent with the provisions of an act of parliament. If the 43 Geo. 3, c. 63, had not passed, it would be quite clear what the meaning was; but I think we may now fairly construe the



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two statutes together, and say that it means the whole number of voyages which the vessel may be engaged to perform. The clauses in the 91st section will then stand quite consistent with each other.

Judgment for the defendant.

June 7.

CLOWES and others v. WILLIAMS.

Debt does not lie by the indorsee of a bill of exchange against the acceptor.

**DEMURRER.** The declaration stated that the defendant had been summoned to answer the plaintiffs, by virtue of a writ issued on, &c., out of the Court of our lord the king before his justices at *Westminster*. For that whereas one *W. B. Clarke*, on the 20th day of *August*, in the year of our Lord 1836, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said *W. B. Clarke*, 20*l.* value received, three months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill, and the said *W. B. Clarke* then indorsed the same to the plaintiffs; and the defendant then promised the plaintiffs to pay them the amount of the said bill, according to the tenor and effect thereof and of the said acceptance and indorsement; whereby, and by reason of the non-payment of the said several monies respectively, an action hath accrued to the plaintiffs to demand and have of and from the defendants the said several monies respectively, amounting to the sum of 40*l.* above demanded; yet the defendants hath not paid the said sum above demanded, or any part thereof; to the plaintiffs' damage of 40*l.*; and thereupon they bring their suit, &c.

The defendant demurred to the first count, and pleaded *nunquam indebitatus* to a second count in the declaration.

*Barstow*, in support of the demurrer, contended that an action of debt is not maintainable by the indorsee of a bill of exchange against the acceptor.

*Wallinger*, *contrà*, admitted that the ground of demurrer was good if applied to a declaration in debt; but he contended, that the first count of the declaration was, in substance, a count in *assumpsit*. He cited *Brill v. Neale* (a).

**TINDAL, C. J.**—Both parties may be allowed to amend. There may be some doubt whether the declaration is not framed in debt, although it contains words of promise. The conclusion is wrong certainly.

**PARK, J., VAUGHAN, J., and COLTMAN, J.,** concurred.

Both parties agreed to amend their pleadings without costs.

(a) 3 B. & Ald. 208.

## CAPPER and others v. FORSTER.

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**A**SSUMPSIT on a charter-party. The declaration stated, that by a certain memorandum for charter, made between the plaintiffs, as owners of the ship *Flora*, of the one part, and the defendants of the other part, it was mutually agreed that the ship should, with all convenient speed, receive and take on board whatever lawful goods and merchandize the charterer might cause to be sent alongside, *and therewith proceed to Rio Nunez, and discharge the same at the factory of the charterer's agent*, and having so discharged her outward cargo, *should reload a full and complete cargo of lawful merchandize, which the said merchant bound himself to ship*, not exceeding what she could reasonably stow and carry, over and above her tackle, &c., and, being so loaded, should therewith proceed to *London*, and discharge at one of the regular docks, at the option of the charterer, on being paid freight as follows, in full, for the above voyage, viz.:—For gum, beeswax, ivory, and palm oil, 4*l.* per ton, at 20 cwt. net, at the king's beam; hides, at 7*l.* per ton of 20 cwt. net, at the king's beam; paddy or rice, 3*l.* per ton, net weight; bullion, 1 per cent.; all or either at the option of the charterer, in full, and in lieu of all port charges and pilotage, as customary; the act of God, &c., always excepted; one half of the freight to be paid in cash on unloading and right delivering of the cargo, and the remainder by an approved bill at three months then following; thirty-five running days to be allowed to the said merchant, if the ship were not sooner despatched for loading, at the places of loading on the coast of *Africa*, and ten days on demurrage, over and above the said lay days, at 4*l.* per day. Should the quantity of paddy exceed eighty tons, 20*s.* per ton extra freight was to be paid on the surplus; and the quantity of hides was not to exceed fifty tons; the charterer to have the liberty of shipping whatever goods he might send outwards free of freight, but paying the difference of the ship's expenses in taking in cargo and going in ballast; and the vessel to call at *St. Mary's* on her homeward voyage for clearance for *England*, the charterer paying her port charges and her pilotage in and out of the River *Gambia*. Should paddy or rice be shipped, the charterer was to find dunnage; *and should the vessel not be full at Rio Nunez, the charterer was to have the liberty of filling her up at St. Mary's*. The parties were bound under a penalty of 700*l.* for the due performance of the agreement.

**Breach**—That the defendant did not load such full and complete cargo at *Rio Nunez* aforesaid; but, on the contrary thereof, loaded at *Rio Nunez* a small part only of a full and complete cargo, to wit, one seventh part only of such full and complete cargo, and then wholly refused to load at *Rio Nunez* any further or greater cargo therein. That after the defendant had loaded on board the said ship at *Rio Nunez* such cargo as aforesaid, to wit, on, &c., the plaintiffs sailed and proceeded with the said ship, by the order and direction of the defendant, to *St. Mary's*, in the said memorandum of charter mentioned, and afterwards, to wit, on, &c., arrived with the said ship at *St. Mary's* aforesaid, and were there ready and willing to suffer and allow the defendant to fill up and complete a full and complete cargo for the said ship of all such lawful

that the charterer did not fill up a full and complete cargo of lawful merchandize.

A ship was chartered to proceed to *Rio Nunez*, and take on board a full and complete cargo of lawful merchandize, freight to be paid upon certain enumerated articles, according to the terms mentioned in the charter-party, "all or either at the option of the charterer," the charterer to have the liberty of filling up the vessel at *St. Mary's*. The charterer put on board about one-seventh of a cargo of the goods enumerated, at *Rio Nunez*, and about the same quantity at *St. Mary's*, and at the latter place the cargo was completed with 84 loads of teak wood, which was not an enumerated article, at 4*l.* per ton. It appeared that the charterer paid for the whole freight 593*l.*, but that a cargo consisting of average quantities of all the enumerated articles, would have produced 668*l.*, whilst a cargo of palm oil, one of the enumerated articles, would only have produced 452*l.* Held, that the plaintiffs were entitled to recover freight to the amount of 668*l.*; and

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merchandize as in the memorandum of charter was mentioned, according to the terms of the said memorandum, and then requested him so to do; nevertheless the defendant did not fill up at *St. Mary's* such full and complete cargo of lawful merchandize, and then filled up a small part only of the said ship with such lawful merchandize as she could have reasonably stowed, and then wrongfully and improperly filled up the said ship at *St. Mary's* aforesaid with a certain large quantity of merchandize, other than according to the true intent and meaning of the said memorandum of charter, to wit, with timber and wood; by means of which several premises, the plaintiffs not only lost and were deprived of a large sum of money, to wit, the sum of 600*l.*, which they might and would have made by having such full and complete cargo of lawful merchandize loaded on board the said ship at *Rio Nunez* and *St. Mary's* aforesaid, according to the terms of the said memorandum of charter, but also, by means of the loading on board the said ship at *St. Mary's* aforesaid such cargo of timber and wood, the said ship was then greatly broken, &c.

And the plaintiffs further said, that a large sum of money, to wit, 1000*l.*, became and was due and payable from the defendant to the plaintiffs for and in respect of the freight of goods, wares, and merchandizes, shipped and loaded on board the said ship, according to the true intent and meaning of the said memorandum, and carried and conveyed therein in the said voyage in the said memorandum mentioned.

Counts for freight generally, and on an account stated.

*Pleas*—To so much of the breach in the first count mentioned as related to the not loading a full and complete cargo at *Rio Nunez*, that the defendant could not load a full and complete cargo at *Rio Nunez* as was mentioned in the said memorandum of charter. Conclusion to the country.

Secondly, as to so much of the breach in the first count mentioned, as related to the defendant not filling up at *St. Mary's* a full and complete cargo of lawful merchandize, that the defendant did, within the said lay days, fill up at *St. Mary's*, in the memorandum of charter and declaration mentioned, a full and complete cargo of lawful merchandize, according to the true intent and meaning of the said memorandum of charter, and did not fill up the said ship at *St. Mary's* aforesaid with any merchandize whatsoever, other than according to the true intent and meaning of the said memorandum of charter. Conclusion to the country.

Thirdly, as to so much of the breach of the promise in the first count mentioned as related to the non-payment of 538*l.* 17*s.* 11*d.*, parcel, &c., that after the said sum of 538*l.* 17*s.* 11*d.* became due and payable from the defendant to the plaintiffs in respect of freight, as in the declaration stated, and before the commencement of this suit, to wit, on, &c., an account was had and stated by and between the plaintiffs and defendants of and concerning the said sum of 538*l.* 17*s.* 11*d.*, and upon that accounting the plaintiffs were found to be in arrear, and indebted to the defendant in the sum of 98*l.* 17*s.* 6*d.*, which was then upon that account allowed to the defendant in account against the said sum of 538*l.* 17*s.* 11*d.*; and the residue of the said last-mentioned sum, to wit, 440*l.* 0*s.* 5*d.*, was then paid by the defendant to plaintiffs, and accepted by them in full satisfaction and discharge of the balance due in respect of the said sum of 538*l.* 17*s.* 11*d.*, after allowing the said set-off of 98*l.* 17*s.* 6*d.*, and of all damage in respect of the said breach of promise, so far as related to the said sum of 538*l.* 17*s.* 11*d.* Conclusion with a verification.

*Pleas* to the two last counts, non-assumpsit.

The *replication* joined issue on the first and second pleas to the first count, and traversed the allegations in the third plea.

At the trial, before *Tindal*, C. J., at the last sittings at *Guildhall*, it was in evidence that the *Flora* had been despatched from *London* to *Rio Nunez*, in pursuance of the charter party. On her arrival at *Rio Nunez*, the charterer's agent informed the captain, that another vessel, the *James*, which was loaded with a cargo of the articles enumerated in the charter-party, had been recently dispatched for the charterer, and had taken the goods intended to be sent by the *Flora*. Only 153 quarters of paddy and a box of gold dust, being about one-seventh of a full cargo, was put on board at *Rio Nunez*. The *Flora* afterwards proceeded to *St. Mary's*, and there the charterer put on board 205 quarters of paddy and 600 hides, and completed a full cargo, under a protest by the captain, with 84 loads of teak wood, the staple commodity of the place, at the freight of 4*l.* per load. Evidence was given to shew that a full cargo of palm oil, at 4*l.* per ton, would have produced a freight to the amount of 452*l.*; and a full cargo of all the articles enumerated in the policy, in average quantities, 668*l.* It appeared that the defendant had paid 593*l.* 18*s.* 6*d.*, on account of the freight. The jury found a verdict for the plaintiff for the further sum of 74*l.* 1*s.* 6*d.*

*Taddy*, Serjt., obtained a rule nisi for a new trial, or to reduce the damages. He contended, first, that the defendant was not bound to load a full and complete cargo at *Rio Nunez*; secondly, that teak wood was a cargo of lawful merchandize, and that the charterer was not obliged to ship such goods only, as were mentioned in the charter-party; and, thirdly, that if such was not the proper construction of the charter-party, then that the damages were improperly assessed.

*Wilde*, Serjt., *Talfourd*, Serjt., and *R. V. Richards*, shewed cause.—Issues have been taken upon the allegations in the declaration, and therefore it is too late to object to the mode in which the breaches are assigned. It is obvious that the principal destination of the ship was *Rio Nunez*; and if the *James* had not been previously despatched, her cargo would have been put on board the *Flora*. Although the ship had liberty to touch at *St. Mary's*, to complete her cargo, it was not thereby intended that she should take a small quantity of goods on board at *Rio Nunez*, and then complete her cargo with articles so much less advantageous to the owner, than a shipment of a general cargo would have been. If the ship had come home empty, the rule of law as to payment of freight, is well established. In such a case, the charterer would be liable to pay the amount of the freight of an average quantity of all the articles which are enumerated. *Thomas v. Clarke* (a), *Wallace v. Small* (b); *Abbot on Shipping*, part 3, chap. 7. In the former case it was contended, as here, that the charterer was at liberty to select one of the enumerated articles which would have yielded the smallest sum to the ship owner; but *Abbot*, C. J., refused to direct the jury to find the damages upon that principle. The same rule must be applicable to this case. *Moorsom v. Page* (c) is

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(a) 2 Stark. N. P. 450.

(b) Cited in *Irving v. Clegg*, 1 Bing. N. C. 55.

(c) 4 Camp. 103.

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distinguishable. In that case the freighters were at liberty to put on board other goods besides those which were enumerated, and therefore it was held, that they were not necessarily bound to ship any copper, although that was one of the articles mentioned in the policy.

*Taddy, Serjt., and Wightman, contrà.*—By the terms of the charter party, the freighter had the option of shipping any of the enumerated articles; and it appears that a cargo of palm oil would not have produced the amount which the defendant has paid into court. Palm oil is an article which produces a fair average profit to the ship owner. It is clear that a cargo of any one of the enumerated articles might have been brought home. In *Moorsom v. Page (e)*, where, by a charter-party, the freighter covenanted to provide for the ship a full and complete cargo, consisting of copper, tallow, and hides, or other goods, it was held, that he having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although, for the want of it, the ship was obliged to keep in her ballast, and did not take so advantageous a freight as she otherwise would have done; and the authority of this case is recognised in *Irving v. Clegg (f)*. Then, upon the two first issues which are raised, the verdict ought to be entered for the defendant, because, as to the first, the defendant was not bound to load and complete a full cargo at *Rio Nunes*. As to the second issue, it appears that a full cargo of lawful merchandize was shipped at *St. Mary's*, and the terms of the policy are, that the ship should reload "a full and complete cargo of lawful merchandize." If the vessel was injured by the timber, that would only be the ground of a cross-action.

*Cur adv. vult.*

TINDAL, C. J.—This was an action of assumpsit, brought on a memorandum for charter made between the plaintiffs as owners of the ship *Flora*, of the one part, and the defendant, of the other part: and upon the issues joined on three breaches assigned in the declaration, the jury found as to the first, that the defendant might have loaded a full and complete cargo at *Rio Nunes*; upon the second, that the defendant did not fill up at *St. Mary's* a full and complete cargo of lawful merchandize according to the true intent and meaning of the said charter, and upon the last, that there is still due to the plaintiffs, from the defendant, the sum of 74l. 1s. 6d. for freight under the charter. There were other issues joined upon the pleadings, to which it is unnecessary to advert, as the principal question before us turns upon the principle upon which the amount of the damages ought to be calculated, reference being had to the proper construction of the charter-party. The defendant has brought the case before us upon a rule calling either for a new trial or for the reduction of the damages given by the present verdict. With respect to the new trial, the defendant contends, that, as to the two first issues, the verdict ought to have been found in his favour. The breaches might possibly have been more aptly and precisely assigned with reference to the terms of the charter, but, as the defendant has thought proper to take issue and go to trial upon them, as framed in the declaration, we cannot think them so deficient in form or so ill adapted to the case, as to be objectionable on that ground in

this stage of the proceedings. And upon the evidence given at the trial, we see no ground to disturb the verdict. As we understand the charter, it contemplates a voyage to *Rio Nunez*, at which place it was intended both by the ship-owners and the merchant that the outward cargo should be discharged, and the homeward cargo put on board, such homeward cargo being intended to consist of the enumerated articles, or of some of them, with liberty, however, of filling up the vessel at *St. Mary's*; that is, of supplying at the latter place any deficiency of the contemplated cargo, which they might be unable to procure at *Rio Nunez*. That *Rio Nunez* was her place of destination appears manifest from the provision that she was to discharge her outward cargo at the factory of the merchant's agent there, and having so discharged her outward cargo, was to reload a full and complete cargo of lawful merchandize, which the merchant binds himself to ship. This is the direct obligation into which the merchant enters; the filling up at *St. Mary's* is only a liberty given to him in his own ease, and for his relief in case he should be unable to comply with his direct obligation. And we think this provision in the charter points so specifically to *Rio Nunez* as the port of discharge and reloading of the homeward cargo, that we cannot give to the mention of ports of loading on the coast of *Africa*, or the liberty of filling her up at *St. Mary's*, the force of altering or controlling the primary intention of the charter. And upon the evidence before the jury of what had taken place at *Rio Nunez* just previous to the arrival of the *Flora*, we cannot think them wrong in finding the first issue for the plaintiffs: they probably, and not unreasonably, thought, that the cargo which had been recently forwarded by the defendant's agents by another ship, the *James*, might have been sent by the *Flora* if those agents had been inclined so to send it.

And as to the second issue, upon the construction we have already put upon the charter-party, we think the jury right in finding, that the loading nearly a complete cargo of lumber at *St. Mary's*, although it was the staple commodity of that place, was not a filling up with lawful merchandize, according to the intention of the parties, and that the verdict upon that issue also ought not to be disturbed. The real question, however, between the ship-owners and the merchant, arises upon the amount of damages which the jury have found by their verdict, which damages, whether they be considered as the measure of the injury sustained by the plaintiffs upon the two first breaches, or as the sum due for the freight of the cargo actually brought home upon the third breach, is immaterial. The plaintiffs, on the one hand, contend that upon the legal construction of the charter, they are entitled to an amount of freight which would have been earned if the ship had brought home a cargo consisting of average quantities of all the enumerated articles; the defendant, on the other hand, contends that the ship-owners are only entitled to freight for the timber actually brought home upon a *quantum meruit*; or to the freight due upon a full cargo of any one of the enumerated articles, at the option of the merchant, or at the very utmost to the freight due upon a full cargo of any one of the articles for which a middle rate of freight is charged; such, for instance, as palm oil; under any of which modes of adjustment, the plaintiffs, as it is admitted, are over-paid. Now if the ship had returned empty, we think the question now raised must be considered as settled. The opinion expressed by the very learned and accurate writer of the law of ships and shipping, re-

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*Our adv. vult.*

TINDAL, C. J.—This was an action of assumpsit, brought on a memorandum for charter made between the plaintiffs as owners of the ship *Flora*, of the one part, and the defendant, of the other part: and upon the issues joined on three breaches assigned in the declaration, the jury found as to the first, that the defendant might have loaded a full and complete cargo at *Rio Nunez*; upon the second, that the defendant did not fill up at *St. Mary's* a full and complete cargo of lawful merchandize according to the true intent and meaning of the said charter, and upon the last, that there is still due to the plaintiffs, from the defendant, the sum of 74*l.* 1*s.* 6*d.* for freight under the charter. There were other issues joined upon the pleadings, to which it is unnecessary to advert, as the principal question before us turns upon the principle upon which the amount of the damages ought to be calculated, reference being had to the proper construction of the charter-party. The defendant has brought the case before us upon a rule calling either for a new trial or for the reduction of the damages given by the present verdict. With respect to the new trial, the defendant contends, that, as to the two first issues, the verdict ought to have been found in his favour. The breaches might possibly have been more aptly and precisely assigned with reference to the terms of the charter, but, as the defendant has thought proper to take issue and go to trial upon them, as framed in the declaration, we cannot think them so deficient in form or so ill adapted to the case, as to be objectionable on that ground in

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this stage of the proceedings. And upon the evidence given at the trial, we see no ground to disturb the verdict. As we understand the charter, it contemplates a voyage to *Rio Nunez*, at which place it was intended both by the ship-owners and the merchant that the outward cargo should be discharged, and the homeward cargo put on board, such homeward cargo being intended to consist of the enumerated articles, or of some of them, with liberty, however, of filling up the vessel at *St. Mary's*; that is, of supplying at the latter place any deficiency of the contemplated cargo, which they might be unable to procure at *Rio Nunez*. That *Rio Nunez* was her place of destination appears manifest from the provision that she was to discharge her outward cargo at the factory of the merchant's agent there, and having so discharged her outward cargo, was to reload a full and complete cargo of lawful merchandize, which the merchant binds himself to ship. This is the direct obligation into which the merchant enters; the filling up at *St. Mary's* is only a liberty given to him in his own ease, and for his relief in case he should be unable to comply with his direct obligation. And we think this provision in the charter points so specifically to *Rio Nunez* as the port of discharge and reloading of the homeward cargo, that we cannot give to the mention of ports of loading on the coast of *Africa*, or the liberty of filling her up at *St. Mary's*, the force of altering or controlling the primary intention of the charter. And upon the evidence before the jury of what had taken place at *Rio Nunez* just previous to the arrival of the *Flora*, we cannot think them wrong in finding the first issue for the plaintiffs: they probably, and not unreasonably, thought, that the cargo which had been recently forwarded by the defendant's agents by another ship, the *James*, might have been sent by the *Flora* if those agents had been inclined so to send it.

And as to the second issue, upon the construction we have already put upon the charter-party, we think the jury right in finding, that the loading nearly a complete cargo of lumber at *St. Mary's*, although it was the staple commodity of that place, was not a filling up with lawful merchandize, according to the intention of the parties, and that the verdict upon that issue also ought not to be disturbed. The real question, however, between the ship-owners and the merchant, arises upon the amount of damages which the jury have found by their verdict, which damages, whether they be considered as the measure of the injury sustained by the plaintiffs upon the two first breaches, or as the sum due for the freight of the cargo actually brought home upon the third breach, is immaterial. The plaintiffs, on the one hand, contend that upon the legal construction of the charter, they are entitled to an amount of freight which would have been earned if the ship had brought home a cargo consisting of average quantities of all the enumerated articles; the defendant, on the other hand, contends that the ship-owners are only entitled to freight for the timber actually brought home upon a *quantum meruit*; or to the freight due upon a full cargo of any one of the enumerated articles, at the option of the merchant, or at the very utmost to the freight due upon a full cargo of any one of the articles for which a middle rate of freight is charged; such, for instance, as palm oil; under any of which modes of adjustment, the plaintiffs, as it is admitted, are over-paid. Now if the ship had returned empty, we think the question now raised must be considered as settled. The opinion expressed by the very learned and accurate writer of the law of ships and shipping, re-



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ferred to in the course of the argument, and the case of *Thomas v. Clarke* (b), the decision of which was not appealed from by any motion to the Court, appears to us to lay down and establish a rule, which is at once just and reasonable, and may fairly be inferred to meet the intentions of the contracting parties. And we can see no real distinction to be made between the application of this rule to the case where the ship returns empty, and where she returns with a cargo of articles altogether, or in a very large proportion, of a different nature and quality from those enumerated in the charter, and between which cargo brought home, and the enumerated articles, there is no common measure whatever. In both cases, the original intention and expectation of the parties, at the time the charter was entered into, as to the amount of freight which would become payable for the voyage, must have been founded upon the assumption that the ship would bring home a cargo, consisting of all or some of the enumerated articles; in both cases, therefore, there exists the same necessity of applying the rule above laid down, which necessity is grounded on the consideration that, unless you adopt this rule, you have no other guide whatever; the liberty to fill up with other lawful merchandizes being understood by us to mean other lawful merchandizes *ejusdem generis*, at least so far as the calculation of the freight is involved in that construction. And as the question of the amount of damages, or the amount of freight, whichever it is to be considered, was left to a special jury of merchants in the city, who have adopted that rule of calculation with respect to the breach of a mercantile contract, it is sufficient for us to say we cannot feel ourselves authorized either to reduce such amount, or to direct a new trial.

Rule discharged.

(b) 2 Stark. N. P. C. 450.

### CUNLIFFE and others v. WHITEHEAD.

May 31.

In an action against the acceptor of a bill of exchange payable to the drawer or his order, the declaration alleged that the drawer indorsed the bill to one S. and that S. delivered the same to the plaintiff.  
*Held*, upon demurrer, that no title to the bill was shewn to be in the plaintiff.

**DEMURRER.** This was an action of assumpsit on a bill of exchange.

The declaration stated that one *William Fraser*, on the 18th July, 1833, at London, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay, to the said *W. Fraser's* order, 1500*l.*, value received, five months after the date thereof, which period had elapsed; that the defendant accepted the said bill; and that the said *W. Fraser* then indorsed the same to Messrs. *Salamonson, Fraser, and Co.*; and that the said Messrs. *Salamonson, Fraser, and Co.* delivered the same to the plaintiffs; of all which the defendant had due notice, and promised the plaintiffs to pay the amount of the said bill, according to the tenor and effect thereof and of his said acceptance thereof.

*Demurrer*, upon the ground that the declaration did not state that the bill had been indorsed to the plaintiffs.

*Crompton*, in support of the demurrer.—The question is, whether the bare allegation of the delivery of the bill to the plaintiffs is sufficient. It is only under peculiar circumstances that the property in a bill passes by delivery.

Here the bill was payable to *Fraser's* order; and *Salamonson* and Co., the indorsees, could only pass it to the plaintiffs, by an indorsement. *Clark v. Pigot (a)* is not recognised as law.

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*Bompas, Serjt., contra.*—Before the new rules of pleading, the defendant could give all matters in defence in evidence, under the general issue; and then the plaintiffs might have alleged that *Fraser* indorsed the bill to them; but now the defendants would have pleaded that no consideration passed between *Fraser* and the plaintiffs. It is not necessary to contend that the mere delivery of the bill to the plaintiffs is sufficient. The question is, whether the plaintiffs may not have a good title to the bill, consistently with the allegations in the declaration. It may appear, at the trial, that the indorsement from *Fraser* to *Salamonson*, was so qualified as to entitle the plaintiffs to recover. Thus a bill may be made payable to the use of a third party. The plaintiffs were strictly confined to use the language given in the forms of the new rules; and, therefore, they were compelled to state the indorsement generally; or, if the indorsement by *Fraser* were a general indorsement, then a mere delivery would pass a title to all subsequent holders of the bill, as a bill payable to bearer.

*Crompton, in reply.*—An indorsement to *Salamonson* and Co., is an indorsement to them or their order, and they could only give a title to their indorsee by an indorsement. If the indorsement were not so, the plaintiffs ought to have shewn it expressly in the declaration.

TINDAL, C. J.—I think, whatever construction may be put upon the new rules, it is clear that they never were intended to effect any alteration in the law merchant, or to make a bill of exchange pass by delivery, which would only pass before, by indorsement. The question arises on the bill as it is described in the declaration. It appears that the action is brought against the acceptor of a bill of exchange, payable to the order of *Fraser*. It is clear that an indorsement by *Fraser* would be necessary; and accordingly, it is averred, that *Fraser* indorsed the bill to *Salamonson, Fraser, and Co.* Now, pausing here for a moment, there was a time when the omission of the words "or order," in the indorsement, was thought to render the indorsement restrictive; but *Edie v. The East India Company (b)* settled that question, and decided that the bill was negotiable by indorsement when in the hands of the indorsee. The question then is, whether, upon looking at the allegations in the declaration, we can consider the indorsement by *Fraser* to be any more than an indorsement to *Salamonson* and Co., or their order; and it seems to me that, in contemplation of law, that is the effect of the statement; and if that be so, it is clear that an indorsement from *Salamonson* and Co. to the plaintiffs was necessary. It is contended that, since the new rules, it must be taken that the indorsement by *Fraser* was an open indorsement, which would operate so as to make the bill pass by a mere delivery: such however is not the legal inference; and as to the argument that the plaintiff has been misled by the new rules, it appears to me that the difficulty has been raised, by not adhering to the precedents which are there given; inasmuch as they all contain an allegation of the indorsement of the bill. Perhaps the facts of the case are such,

(a) 1 Salk. 126.

(b) Burr. 1216.

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that no allegation of an indorsement could be made. It is, however, sufficient to say, that, as there was an actual indorsement to *Salamonson* and Co., the right to bring this action cannot pass to the plaintiffs by a mere delivery of the bill.

PARK, J.—I am of the same opinion. This is the first time I ever saw a declaration framed in this manner. In all the precedents given in the new rules, the transfer of such a bill is stated to be by indorsement.

VAUGHAN, J.—It is not intended by the new rules, to alter the law upon this subject. The simple question is, whether this appears to be an open or a restricted indorsement; and even if this were equivocal, the defendant would be entitled to our judgment.

COLTMAN, J.—This question turns on the meaning of the allegation, that *Fraser* "indorsed the bill to *Salamonson, Fraser, and Co.*" It may mean that *Fraser* simply wrote his name; or that he made it payable expressly to their order. It seems rather to point to the former mode of indorsement; but the statement is equivocal. However this might be, if the declaration had alleged a subsequent indorsement to the plaintiffs, then a good title to the bill would have been made out, but I presume that no such indorsement was made; therefore, as the right to bring this action could not be given by a mere delivery of the bill, our judgment must be for the defendant.

Judgment for the defendant.

May 23.

### BAYLEY v. HOMAN.

In an action for a breach of covenant in not delivering up a messuage in repair at the expiration of the term, the defendant pleaded, that after the covenant was broken, an agreement was entered into between the plaintiff and defendant, that in consideration that the plaintiff had become tenant from year to year, and had promised to repair the premises before the 12th of April, he, the plaintiff, would give time for the reparation, without bringing an action in the meantime, yet that the plaintiff wrongfully commenced the suit, before the 12th of April. Held, that this plea was bad—first, because it was a plea of an accord executory only, and not executed; secondly, that there was no good consideration laid for the defendant's promise to repair, or for the plaintiff's promise to forbear to sue for the breach of covenant.

THIS was an action of covenant for not repairing a messuage, brought by the assignee of the reversion, against the assignee of the term. The breach assigned was, that the defendant did not, after the assignment and during the continuance of the demise, well and sufficiently repair the messuage and did not, at the end of the term, leave the same so well and sufficiently repaired; but during the demise, to wit on the 1st of *January*, 1835, and from thence until the end of the term, suffered and permitted the said messuage, to be ruinous and in great decay for want of repairing the same, and the defendant, at the end of the term, left, surrendered, and yielded up the premises, unto the plaintiff, so badly and insufficiently repaired.

*Plea*—That after the said covenant had been broken by the defendant, and after the expiration of the said term, and long before the commencement of this suit, to wit, on the 26th day of *December*, 1836, the said messuage being

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so ruinous and in decay, as in the declaration alleged, it was agreed by and between the plaintiff and the defendant, and the plaintiff also then promised the defendant, that, in consideration that the defendant, at the request of the plaintiff, had become, and then was, the occupier of the said messuage, and held the same as tenant thereof from year to year, at and under a certain yearly rent therefore payable by the defendant to the plaintiff, and had also at the like request of the plaintiff, promised the plaintiff well and sufficiently to repair and amend the said messuage in the manner required by the said indenture in the declaration mentioned, on or before the 12th of *April*, 1836, he, the plaintiff, would forbear and give to the defendant until the said 12th of *April*, 1836, for the due reparation and amendment of the said messuage, in the manner required by the said indenture, without, in the mean time, commencing or prosecuting any action or suit against the defendant in respect of the said breaches of covenant in the declaration mentioned, or any part thereof; and that in case the said messuage should be so well and sufficiently repaired and amended as aforesaid on the said 12th of *April*, 1836, he the plaintiff, would then relinquish and forego all claim and demand whatever of him, the plaintiff, upon or against the defendant, in respect of the said breaches of covenant or any part thereof. The plea then averred, that although from the time of the making the said agreement and thenceforth until the commencement of this suit, the defendant, who during all that time remained tenant of the said messuage to the plaintiff as aforesaid, was always ready and willing to perform and fulfil the said agreement on his part, and well and sufficiently to repair and amend the said messuage in the manner required by the said indenture, so that the same should be so well and sufficiently repaired and amended by and on the said 12th of *April*, 1836, whereof the plaintiff had notice, yet the plaintiff, not regarding his said agreement and promise, wrongfully commenced his suit in that behalf against the defendant before the said 12th of *April*, 1836, to wit, on the 6th of *April*, 1836; and that the defendant was ready to verify.

At the trial, a verdict was found for the defendant, and in *Easter Term*, *Stephen*, Serjt., obtained a rule *nisi*, to enter judgment for the plaintiff *non obstante veredicto*, on the ground that the plea did not disclose any legal bar to the action.

*Talfourd*, Serjt., and *Gurney*, shewed cause.—The defendant is entitled to retain the verdict. The plea shews that the plaintiff entered into an agreement with the defendant, which constituted a new contract between them; and the action on the covenant was suspended. *Good v. Cheesman* (a), *Stracey v. The Bank of Euyland* (b). In Com. Dig. tit. Accord, (B. 4.) it is said, that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; and that principle was acted upon in *Cartwright v. Cooke* (c). In *Alden v. Blague* (c), in an action for breach of covenant to repair, the defendant pleaded that he made an agreement with the plaintiff to pay thirty shillings in satisfaction, which he had received; and it was held that the plea was good, although it was objected that the action, being grounded upon a deed, could not be discharged unless by deed. In

(a) 2 B. &amp; Ado. 328.

(b) 6 Bing. 754.

(c) 3 B. &amp; Ado. 701.

(d) Cro. Jac. 99.

JUNE 9.

## PASCOE and another v. J. PASCOE the younger.

In replevin, the defendant avowed for rent in arrear, and the plaintiff pleaded in bar, that by the demise in the avowry mentioned, the avowant demised and transferred the premises to the plaintiff for all the residue of the avowant's estate, term, and interest in the same, and that the avowant had not, at the time when, &c., or at any time during the demise, any reversionary estate, term, or interest in the same. The defendant rejoined, that by an award made in an arbitration between the plaintiff and defendant, a power for disstraining upon the premises for rent, was given to the defendant: *Held*—first, that the plea alleged with sufficient certainty, that the avowant, at the making of the demise, did not reserve any reversion in himself. Secondly, that the rejoinder was insufficient, because it did not appear that the arbitrator had any authority to give the defendant the power of disstraining.

**D**ECLARATION in replevin for taking goods. *Avowries*—first, that the plaintiffs, for all the time during which the rent hereinafter mentioned to be distrained for, was accruing due, and from thence until and at the time when, &c., held and enjoyed the premises, in which, &c. as tenants thereof to *J. Pascoe* the younger, by virtue of a certain demise thereof to the plaintiffs theretofore made, at and under the yearly rent of 32*l.*, payable half-yearly; and because 80*l.* of the rent aforesaid, at the time when, &c., was due, he, the defendant, well avowed the taking of the goods as a distress.—Second—that the plaintiffs, for two years and upwards next before the time of making the agreement hereinafter mentioned, held and enjoyed the premises as tenants thereof to the said *J. Pascoe* the younger, by virtue of a certain demise thereof to the plaintiffs theretofore made, at and under a certain yearly rent, to wit, the yearly rent of 36*l.*, payable half yearly. That before the making of the said agreement, to wit, on, &c., the said *J. Pascoe* the younger, had caused to be distrained, on the said premises, divers goods and chattels, for the sum of 36*l.*, arrears of rent then due; and the plaintiffs had replevied the said goods, and commenced an action against the said *J. Pascoe* the younger, in the Sheriff's Court of Cornwall, which action was afterwards removed to the Court of King's Bench, and was then pending; that disputes and differences having arisen between the said parties, relative to the said distress, an action at law and other matters relative to the premises, particularly as to the amount of the yearly rent which should be paid for the said estate—the plaintiffs and *J. Pascoe* the younger, for the ending and determining thereof, did, before the said time when, &c., to wit, on, &c., by a certain agreement in writing, mutually and reciprocally agree with each other, that, as well the matters aforesaid as all other matters in difference between the said parties, and more particularly the amount of the rent which should be paid for the said premises, should be and the same were thereby submitted and referred to the award, final end, and determination of *Robert Julian*, whose award was to be final and conclusive, both at law and in equity, as well on the part of *J. Pascoe* the younger, as on the part of the plaintiffs, to settle and ascertain the same, and to award, order, and determine, by his award, what he should think fit to be done and performed by the said parties respectively, respecting the several matters aforesaid. That the said *R. Julian*, having heard the allegations and proofs of both the parties, did afterwards, and before the said time when, &c., make and publish his award, under his hand and seal, upon and concerning the premises aforesaid; and did thereby, (amongst other things,) award, order, and determine that, from *Midsummer* then last, the plaintiffs should pay to *J. Pascoe* the younger, for the premises in which, &c., 32*l.* per annum, instead of 36*l.* per annum before paid, by half yearly payments, at *Christmas* and *Midsummer* in every year, so long as they should continue to hold the said premises; and that the said *J. Pascoe* the younger should have power of distress for recovery of the said rent of 32*l.* That the plaintiffs, from the time of making the said award, until and at the time when, &c., as tenants thereof to the said *J. Pascoe* the younger, at the

said yearly rent of 32*l.*, payable half yearly on, &c., and that the said *J. Pascoe* the younger, by means of the premises, had for and during all the time last aforesaid, such power of distress as aforesaid; and because 64*l.* arrears of the rent aforesaid, at the said time, when, &c., was due, he the defendant well avowed the taking of the goods as a distress.

Pleas in bar to each of the avowries and cognizances:—That by the said demise, in the said avowry mentioned, the said *J. Pascoe* the younger did demise and transfer the said premises, in which, &c., unto the plaintiffs, for all the residue and remainder of his, the said *J. Pascoe* the younger's, estate, term, and interest, in the same, and that the said *J. Pascoe* the younger had not then, or at the said time, when, &c., or at any time during the said demise to the plaintiffs, any reversionary estate, term, or interest, of or in the premises with the appurtenances, in which, &c., or any part thereof, expectant upon or to take effect upon, or at any time after the expiration of the term granted to the plaintiffs by the said demise; and that the plaintiffs were ready to verify, &c.

In the replications to the pleas in bar, the avowant relied on the power of distress given to him in the award, as set forth in the second avowry.

*Rejoinder*—That it was not referred to the said *R. Julian*, whether the said *J. Pascoe* the younger, should have power of distress for recovery of the said rent; with a conclusion to the country.

*Demurrer*; and the causes assigned were, that the plaintiffs had in the rejoinders stated and attempted to put in issue a fact not alleged by the defendant in his replication, and wholly irrelevant and immaterial, to wit, that it was not referred to the said *R. Julian*, whether *J. Pascoe* the younger, should have a power of distress for recovery of the said rent of 32*l.* per annum; and also, for that the said rejoinders containing new matter, the plaintiffs should have concluded the same with a verification.

*Joinder in demurrer.*

The demurrer was argued by *Stephen*, Serjt., for the defendant, and *Ogle*, for the plaintiffs, in *Hilary* Term, 1837.

*Cur. adv. vult.*

TINDAL, C. J.—In this replevin the defendant has made two avowries and cognizances. The first is in the general form given by the statute 11 G. 2. c. 19, that the plaintiffs held the premises in which, &c., as tenants to *Pascoe* the younger, under a demise thereof to them made for a certain term, and then avows for two years' rent in arrear. To this avowry the plaintiffs have pleaded in bar, that by the demise in the avowry and cognizance mentioned, *Pascoe* the younger demised and transferred the premises in which, &c., to the plaintiffs, for all the residue and remainder of his, (the lessor's,) estate, term, and interest, of, and in the same: and that he the said *Pascoe* the younger, had not then, or at the said time when, &c., or at any time during the demise, any reversionary estate, term, or interest in the same. The defendant has replied to this plea in bar, a power of distress given to *Pascoe* the younger, by the award of an arbitrator to whom certain disputes and all matters in difference between him and the plaintiffs, had been referred; the plaintiffs in their rejoinder to this replication allege, that it was not referred to the arbitrator, whether the defendant, *Pascoe* the younger, should have a power of distress; to which rejoinder the defen-

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dant demurs specially. Upon this state of the pleadings, it is obvious that the defendant's replication to the plea in bar, would be bad upon general demurrer, on the ground of departure; the defendant in his avowry and cognisance, relying upon the common law right to distrain as for rent service, and in his replication setting up a power of distress given under an award. The question, therefore, so far as the first avowry and cognisance are concerned, becomes this, whether the plea in bar affords any legal answer thereto. This question is to be determined, as if it were upon a general demurrer to the plea in bar, and, therefore, no objection can be available, which amounts to matter of form only, such as that the plea in bar is in effect no more than the general traverse *non tenuit* or *non demisit*; and looking at the substantial allegations in the plea in bar, we think it alleges with sufficient certainty, that *Pascoe* the younger, at the time of making the demise, did not reserve any reversion in himself, and, consequently, without any express provision for that purpose, has no remedy by distress. The authorities to this point are collected in *Bacon's Abr. tit. Distress, (A.)* And as to the argument that the plea in bar is incongruous, inasmuch as it admits a demise, but sets up an assignment, we cannot distinguish it from that in *Preece v. Corrie* (a), which was held to be a good plea in bar; nor from the authority of the decision in *Parmenter v. Webber* (b), where the assigning of the landlord's whole interest in a term to the plaintiff, was held to be evidence which supported the plea of *non tenuit*. For, although it is true that this rent may be a rent seck, and that the remedy is the same under the statute, for a rent seck as for a rent service, yet the avowry is for a rent service, at common law, and not for a rent seck. So far, therefore, as relates to the first avowry and cognisance and the pleadings dependant thereon, we think the plaintiffs are entitled to judgment. The second avowry and cognisance rests upon a power of distress given by an award, under an agreement, entered into between the plaintiffs, and the defendant *Pascoe* the younger, by which certain disputes and differences relative to a distress which had been then made, and an action at law then depending, and all other matters in difference between the said parties, were submitted to the arbitration of Mr. *Julian*. The plaintiffs plead in bar to this, the very same matter which they had pleaded in bar to the first avowry, viz., that *Pascoe* the younger had demised to them, all the residue and remainder of his own estate, term, and interest in the premises in which, &c., and that he had no reversionary interest in himself. To this plea in bar, the defendant replies the very same matter as that contained in the second avowry, viz., the power of distress given by the arbitrator; and the plaintiffs rejoin thereto, that the giving such power of distress was not a matter within the submission. Upon this state of the pleadings, arising on the second avowry and cognisance, the rejoinder must be given up, as being a departure from the plea in bar, and the question of law must be taken to stand as if there had been a general demurrer by the defendant, to that plea in bar. In that view of the case, the facts admitted on the record would be, that *Pascoe* the younger had originally demised to the plaintiffs, the premises in question, at the rent of 36*l.* per annum, but that, upon such demise, he had parted with the whole of his estate and interest, and left himself no reversion; and that a distress had been put in for one year's rent, due under such demise, which the plaintiffs had replevied, and the action for replevin had been removed into the Court of King's Bench, and was still pending. It would also appear upon the record, that disputes and differences

(a) 5 Bing. 24.

(b) 2 B. Moore. 656.

had arisen and were subsisting, between the parties, as to the distress and action at law, and other matters relative to the said tenement, particularly as to the amount of the yearly rent which should be paid for the said estate; and that the parties agreed to refer as well the matters aforesaid, as all other matters in difference between them, to the award of Mr. *Julian*. The question, therefore, becomes this, whether, under such submission, the arbitrator had authority to give a power to distrain for the rent newly fixed by him, which power of distraining the landlord did not possess as to the rent originally created by the demise. And we think the arbitrator's authority to give this power ought either to appear by the express words of the submission, or that it should be brought within the general words of the submission, by a distinct averment on the record, that the question as to the power of distress, was one of the matters in difference between the parties to the submission. There is scarcely any conceivable addition to the landlord's powers, which the arbitrator might not have given, unless he is held to be restrained by those two considerations—a power to enter for non-payment of rent, or non-performance of covenants, might be given by the same authority as a power to distrain. Upon the single ground, therefore, that we do not see that the arbitrator had any authority to give the power of distress, for the rent newly fixed by him, and which, in all other respects, came in the place of the former rent reserved by the demise, we think the second avowry and cognisance cannot be supported, and that there must be judgment on that also for the plaintiffs.

Judgment for the plaintiffs.

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**BRAMAH and another v. ROBERTS and seven others.**

*Nov. 22 & 23.*

**ASSUMPSIT** on a bill of exchange for 500*l.*, drawn by one *William Clare*, and accepted by the defendants, payable to his order, and indorsed by *Clare* to the plaintiffs. *Pleas*—first, by *E. M. Roberts, Lewis Roberts, and William Clare*, three of the defendants—that *Clare* did not indorse the bill to the plaintiffs; second, by *Baker, J. Foster, G. H. Foster, Lyal, and Blakesley*, the remaining five defendants, that they did not accept the bill of exchange *modo et formd.*

At the trial, before *Tindal, C. J.*, the following appeared to be the facts of the case:—In *May, 1831*, a company was advertised, by the title of *The South Metropolitan Gas Light and Coke Company*, and shareholders were requested to pay a deposit of *1*l.** per share to certain bankers; and an account was opened by the bankers, with the defendants, *E. M. Roberts, L. Roberts, Baker, Clare*, and others, who were styled directors of the company. A secretary was also appointed. Many of these deposits were paid in 1830 and 1831, and the directors commenced the erection of a suitable building for carrying on the

1. A bill was drawn by one of the directors of a company called *The South Metropolitan Gas Light and Coke Company*, upon himself and the other directors, payable to his order, and accepted by another director, as chairman to the company. *Feld*, that the body of directors were not liable to be sued on the bill; that the right of one

director to draw a bill upon the rest, and the power of one director to accept a bill for himself and the others, is not a right or power implied by law, like that which belongs to a member of an ordinary partnership; but that the right must depend upon the powers given by the charter or deed or agreement, under which the company is established, or some other agreement between the parties; and, further, that the plaintiff who seeks to enforce payment of the bill must shew the existence of such a power.

2. Where it appeared that the directors of the company had given bills of exchange, accepted by one or more directors, before the defendants became directors; but, since that period, no such bills had been accepted; and the jury found, upon these and other facts, that there was no express authority given by the new directors, to draw or accept bills, the Court refused to grant a new trial.



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manufacture of gas. The persons who supplied the materials and other articles for the building, were paid by bills of exchange, usually at long dates, drawn by the creditors upon certain of the directors. These bills were sometimes drawn upon *Roberts* and two directors, and accepted by *Roberts* alone; and sometimes upon three directors, all of whom wrote their acceptances. Fifteen of these bills were produced at the trial. The undertaking not being prosperous; a balance was struck at the bankers, in *February*, 1832; and no further proceedings were taken until *April*, 1833, when the defendants, Messrs. *Foster*, *Lyle*, and *Blakeley*, joined the concern, and became directors. Several of the bills which were then unpaid were discharged, and further measures were taken to carry on the object of the company; but no more bills were drawn, and all payments were made in cash. Two of the creditors who had formerly received bills, stated that they had heard that no more bills were to be given by the company. A new account was opened at the bankers; and in pursuance of instructions received by them, they paid no checks unless they were signed by three or five directors, and countersigned by the secretary; and it was proved that many such checks had been paid by the bankers.

The bill upon which the action was brought, was drawn by *Clare*, without the knowledge of Messrs. *Foster* and the other new directors, on the 22nd of *October*, 1833, and was addressed to Messrs. *E. M. Roberts*, *James* and *G. H. Foster*, *F. Blakeley*, and others, directors of the South Metropolitan Gas Light and Coke Company, No. 3, *Crosby Square*; and the form of acceptance was, "Accepted for self and directors. *E. M. Roberts*, Chairman."

*Clare*, the drawer of the bill, was the same person as the defendant *Clare*; and he indorsed the bill to the plaintiffs. *E. M. Roberts*, the acceptor, had absconded before the action was brought.

The learned judge told the jury that no question arose on the second issue, as to the consideration given by the plaintiffs for the bill; but that the question for their consideration was, whether the defendants had recognized an authority in *Roberts*, to accept bills for the other directors; or whether they had so conducted themselves as to shew that any such express authority was given. The jury found a verdict for the plaintiffs on the first issue, and for the defendants on the second issue.

*Wilde*, Serjt., obtained a rule *nisi* for a new trial upon two grounds—first, that by the course of dealing between the parties, there was an implied authority given to any one of the directors to bind the others, by his acceptance; and, secondly, that the verdict was against evidence.

Sir *W. W. Follett*, *Amos*, and *Crowder*, shewed cause for the *Fosters*, *Lyle*, and *Blakeley*.—The first question is, whether it appears that an implied authority was given by the defendants to *Roberts*, to accept the bill. Unless such an authority is shewn, the plaintiffs are not entitled to recover; and the onus of proving this, by clear and undisputed evidence, lies most strictly upon the plaintiffs. First, it is said, that the defendants are shewn to be in partnership with *Roberts*, and that the law implies that an authority is given by one partner to another, to accept bills for the purposes of trade. It is not denied, where a partnership of merchants exists, that the law does imply such a power; but, by the evidence, it clearly appeared that the defendants were not partners, but

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members of a joint stock company. The question, therefore, is, whether the members of a joint stock company are responsible as partners, for bills drawn by their chairman; or whether one director is liable for an acceptance given by another director, or by a mere shareholder. For some limited purposes, the members of joint stock companies may be partners; but there is a great difference between this and an ordinary partnership, and no implied authority to draw or accept bills, arises. Joint stock companies are not founded upon mutual confidence, like ordinary partnerships, but they are conducted upon certain terms which are specified in a deed, or act of parliament. Here no deed was given in evidence; but that was the fault of the plaintiffs, upon whom the onus of proof lay, as appears in *Fos v. Clifton* (a). If there were any special provisions contained in any deed or other document, which empowered the chairman to accept bills, and thereby to make the defendants liable, such power ought to have been proved by the plaintiffs, at the trial. *Dickinson v. Valpy* (b) is a case very similar to the present: there an action was brought against the defendant, a shareholder in the *Cornwall and Devonshire Mining Company*, on a bill of exchange drawn in pursuance of a resolution of the directors; but it was held that the defendant was not liable. The observations of *Littledale, J.*, are precisely applicable to the present point. He says, "This bill is drawn by *Richard Wilks* for the *Cornwall and Devonshire Mining Company*. It is addressed to the company, and accepted for them by *John Wood*, their secretary. In its form, therefore, it is very unusual. It is not a bill drawn by individuals upon others, but drawn for and accepted by a mining company. When the plaintiff, therefore, took this bill, he had notice on the face of it, that it was not an ordinary bill of exchange. It was then incumbent on him to inquire whether the persons who drew and accepted this bill, had authority by such acts, to bind the defendant, the latter not appearing on the face of the bill to be a partner with those persons; and it was incumbent on the plaintiff to prove, at the trial, that they had such authority. In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another, by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to shew that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others, by drawing and accepting bills of exchange. In the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company, (which is not a regular trading company,) to bind the rest, by drawing or accepting bills. One of several persons jointly interested in a farm, has no power to bind the others by drawing or accepting bills, because it is not necessary for the purposes of carrying on the farming business that bills should be drawn or accepted. The object of persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things, in order to raise and put the produce in a saleable state, yet it is not necessary for that purpose that bills of exchange should be drawn." So here it was incumbent on the plaintiffs to make inquiries before they

(a) 6 Bing. 776; 9 Bing. 115.

(b) 10 Barn. &amp; Cress. 128.

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took the bill, and then they would have ascertained that *Roberts* had no authority to accept it. Whenever a bill is drawn otherwise than in the usual form, parties ought to be on their guard and make inquiries before they take it; as where a bill was accepted by procuration, it was held to be duty of an indorsee to require the production of the authority of the person who assumed to exercise it, *Attwood v. Munnings* (c). Here there was enough on the face of the bill, to put the plaintiffs on their guard. The general authority of one partner to draw bills, whereby to charge another, is only an implied authority. *Lord Galway v. Mathews* (d). And if this is to be treated as a case of partnership, then it appears that the bill is drawn only on a portion of the partners, because the shareholders are equally liable with the directors, upon any implied authority which can be raised. In fact, this bill is not drawn upon the company, but upon certain members of it. How then can an authority be implied, enabling the chairman to accept bills drawn in this form? Even when a bill is drawn for partnership purposes, it must be drawn in the name of the partners, by their style and firm, and not in the name of a part of the firm. *Emily v. Lye* (e), *Denton v. Rodie* (f), *South Carolina Bank v. Case* (g), *Ducarey v. Gill* (h). The verdict is not against evidence, because there was no proof whatever, of any authority being given to *Roberts* to accept bills. The object of this action was to make out a case against the Messrs. *Foster*, and the other persons who joined the company in 1833. But no bills were proved to have been issued after that period, and all payments appeared to have been made in cash. The bankers proved, that they would not have paid a check, unless it was signed by three or five directors, and countersigned by the secretary. If it is contended that the new shareholders adopted the former course of dealing of the company, then the answer is that the plaintiffs did not prove that they had any knowledge of the former dealings. There was nothing to shew that the new directors had allowed *Roberts*, to accept, bills so as to deceive the public, and that question was expressly left to the jury. It was a strong fact to go to the jury, that the plaintiffs received this bill from *Clare*, who was himself one of the directors.

*Wilde, Serjt., and Kelly, contrà.*—There is nothing in *Dickinson v. Valpy* (i), which may not be admitted for the purposes of this argument. No issue was raised by the five defendants, as to the validity of the indorsement of the bill to the plaintiffs, and therefore it must be considered as having been made upon good consideration. This is the case of an ordinary partnership between the persons who called themselves directors; but there was no evidence, whatever, to shew the formation of a joint stock company. The mere payment of a few deposits did not make a company; and there was no evidence, that any one share was paid up in full. In *Dickinson v. Valpy* (i), it appeared that a company was regularly established, and, amongst other grounds, the Court also held, that the defendant was not liable, because it was not satisfactorily proved that he was a shareholder. Here it appears, that when this scheme was set on foot, the directors obtained goods upon a long credit, by accepting bills of exchange, drawn upon the directors in different forms. This created a presump-

(c) 7 B. & Cress. 283.

(d) 10 East. 264.

(e) 15 East. 7.

(f) 3 Camp. 403.

(g) 8 B. & Cress. 427.

(h) 1 Moo. & Mal. 450.

(i) 10 B. & Cress. 128.

tion of a dealing by bills of exchange. No advertisement appears to have been published, to caution the public against taking any future bills accepted by the directors; this ought to have been done by the new directors who became partners in 1833, if they wished to relieve themselves from a liability to pay any future bills of exchange. There is nothing in the nature of the manufacture of gas, to distinguish it from an ordinary trade which may be carried on by partners. Coal and other articles must be purchased, and tar and coke, as well as gas, is sold. In *Dickinson v. Valpy*, reliance was placed upon the absence of proof that any other mining company had been accustomed to issue bills of exchange, but here it was proved that this very company had issued such bills; therefore, upon that point, it is an authority for the plaintiffs. It is said that the plaintiffs ought to have used more caution before they received the bill, but the defendants cannot raise that question under the issues placed on the record; and the doctrine upon this subject is, that it is only in cases of gross negligence and fraud, that the holder of a bill of exchange loses his remedy. *Foster v. Pearson* (k), *Backhouse v. Harrison* (l), *Crook v. Jadis* (n).

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TINDAL, C. J.—This was an action in which the plaintiffs declared, in their first count, upon a bill of exchange for 500*l.* bearing date the 22nd October, 1833, drawn by *William Clare*, upon, and accepted by, the defendants, payable to the order of the drawer, and by him indorsed to the plaintiffs. Three of the defendants, *E. M. Roberts*, *Lewis Roberts*, and *William Clare*, pleaded to this count that *William Clare*, did not indorse the bill of exchange to the plaintiffs; and the remaining five defendants, viz., *Baker*, the two *Fosters*, *Lyal*, and *Blakesly*, pleaded that the defendants did not accept. The issue upon the first plea was found for the plaintiffs; the issue upon the second, for the defendants; and the question comes before us on a motion by the plaintiffs for a new trial, upon two grounds; first, that from the situation in which the defendants were placed with respect to each other, there was an implied authority given to any one to bind the others by his acceptance, and next, that the verdict was against evidence. The bill of exchange, when produced in evidence, appeared to be dated 22nd October, 1833, to be drawn by *William Clare*, and to be directed to Messrs. *E. M. Roberts*, *James* and *G. H. Foster*, *F. Blakesly*, and others, Directors of the South Metropolitan Gas Light and Coke Company, No. 3, *Crosby Square*, and the form of the acceptance was, "Accepted for self and directors, *E. M. Roberts*, Chairman."

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The bill was made payable to the order of the drawer, by whom it was afterwards indorsed to the plaintiffs. Upon the face of the bill, therefore, and without evidence to explain the actual relation of the parties to each other, it did not appear to be a bill of exchange accepted by one of the partners of an ordinary firm, trading in partnership together, but a bill drawn upon the directors of a joint stock company, and accepted by the chairman for himself and the other directors. For the address of a bill to the directors of a metropolitan company, and the frame of acceptance by a chairman of such directors, for himself and other directors can

(k) 5 Tyrwh. 255.

(l) 5 B. & Ado. 1098.

(n) 5 B. & Adol. 909.

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only be referable, unless some explanation is given, to a company of the description well-known in all the courts of law and equity in *Westminster Hall*, as joint-stock companies, and not to ordinary partnerships in trade. It was proved upon the trial of the cause, that *Clare*, the drawer of the bill from whom the plaintiffs derived title, and upon whose indorsement they rely, was the same *William Clare*, who is one of the acceptors, and one of the defendants in his capacity of acceptor; so that the bill is drawn by one of the directors, upon himself and the other directors, payable to his own order, and accepted by another director for himself and the rest. But the right of one director to draw a bill upon the rest, and still further the power of one director to accept a bill for himself and the others, so as to make those others liable, according to the case of *Dickenson v. Valpy* (a), in the authority of which case we entirely concur, is not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade, with respect to bills drawn and accepted for the purposes of the trade; it must depend upon the powers given by the charter, or deed, or agreement, under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect. But, upon the trial of this cause, no evidence whatever was given by the plaintiffs of the constitution of this company, nor of any authority given, by deed or otherwise, to any one of the directors to bind the other directors, or to bind the company at large, by his acceptance of bills of exchange; and in the absence of such evidence, we are of opinion that no such authority is to be implied by law, or can be held to exist. The principal contention, however, on the argument before us on the part of the plaintiffs, has been rested on two grounds; first, that the defendants are, in point of fact the only persons who have any interest in the concern, so that the calling themselves directors on the face of the bill, is matter of description only, which they have thought fit gratuitously to assume, whilst they are in fact, the individual partners in an ordinary trade or business; and, secondly, that even if they are to be considered as directors, the evidence at the trial proved that the defendants had paid various bills accepted in the same form, and that such mode of dealing shews, that they have treated themselves as liable under the present form of acceptance, and is sufficient evidence of a mutual authority to bind each other by accepting bills of exchange. As to the first ground of argument, there was no evidence to shew that the defendants were any other than as described upon the bill, that is, directors of a company properly so called. On the contrary, the evidence given on this subject, so far as it went, tended to establish that a joint stock company really existed; for it was proved that, in *May*, 1830, the sum of one pound per share had been paid into the bankers as a deposit; that the account was opened with the bankers, in the name of the South Metropolitan Gas Light and Coke Company; that the payments by the bankers were made upon the signatures of the directors; and that there was a secretary to the company; all which evidence is applicable only to the existence of an ordinary joint stock company; and if it was intended to rely on an alteration in the nature of the company since that time, such alteration should have been proved by the plaintiffs. As to the second ground of the plaintiffs' argument, the evidence was, that two of the defendants, the

(a) 10 B. & C. 128.

Messrs. *Foster*, did not become directors until about the 24th of *April*, 1833; that no bill of exchange had been accepted since that time, but that all payments had been made in cash; and that no bill in which the names of the Messrs. *Foster* were specified, and, indeed, no bill drawn since the time at which they joined in the concern, had been paid with their authority. And as to the payments which they had sanctioned, such payments were all confined to payments of former acceptances, before they became partners, which had been given on account of goods furnished to, or work done for, the company; that is, acceptances to which they were not personally liable, but which they might think themselves under a moral obligation to pay. If, indeed, the Messrs. *Foster* had paid bills of exchange drawn upon *Roberts* and other directors, and accepted by *Roberts* "for self and other directors," after they had acquired a share in the concern, and become directors, it might have afforded evidence of an authority to the chairman to accept the present bill, and, consequently, of their liability under such acceptance; but no such evidence was given. We cannot, therefore, see sufficient reason for sending this cause to a new trial; for we think the jury were justified, upon the evidence which was before them, in coming to the conclusion at which they arrived, on both the points left to them; and it is not suggested that any new evidence could be laid before them upon a second trial, of which the plaintiffs might not have availed themselves on the first. And as to the point which was reserved at the trial for consideration, we are satisfied that there was no implied authority to *Roberts* to accept this bill, resulting from the situation of the parties in the concern.

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Rule discharged.

### STOWELL v. ROBINSON.

June 10.

**ASSUMPSIT.** The declaration stated, that, by an agreement between the plaintiff and the defendant, the defendant agreed to sell the lease and good-will of a public-house to the plaintiff, and to deliver possession thereof by the 3rd of *May*; that upon the making of the said agreement the plaintiff paid a deposit of 50*l.*; and the defendant undertook that he then had lawful right and title to assign over the said lease to the plaintiff. *Averment*—That the defendant had not lawful right and title, at the time of making the agreement, to sell and assign over the lease to the plaintiff. Counts for money paid, money had and received, interest, and on an account stated.

*Pleas*—*First*; Non-Assumpsit. *Second*; to the first count, that the defendant had lawful right and title, to sell and assign over the lease as in the agreement mentioned. *Third*; to the first count, that neither the plaintiff or defendant

1. A vendor, by an agreement in writing, contracted to sell the lease and good-will of a public-house; and one of the conditions was, that possession should be delivered on the 3d of *May*. *Held*, in an action brought by the vendee to recover back his deposit, that parol evidence of an agree-

ment between the parties, to waive the day which was stipulated, and to substitute another, was inadmissible, as being in contravention of the Statute of Frauds.

2. In an action for non-performance of a contract for the sale of a leasehold house, the declaration alleged that the defendant had not lawful right and title to sell and assign the lease, at the time the contract was made. It was ascertained, after the sale, that the assignments of the lease to the vendor, and to former assignees, had not been registered; and also that the vendor was restrained from assigning without a license from the ground landlord; and that no such license had been obtained at the time the contract was made. *Held*, that neither of these objections impeached the validity of the vendor's title, as the defects were capable of being remedied.

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were ready by the day in the agreement mentioned for completing the purchase; that they thereupon agreed to postpone the performance of it for a reasonable time, and that the plaintiff should accept an assignment of the lease, if the defendant made out a title within such reasonable time; that within such reasonable time the defendant made it appear to the plaintiff that he had such title, but the plaintiff refused to perform the agreement, and prevented its completion.

Issues were raised upon these pleas; and also upon other pleas which are not material.

At the trial, before *Tindal*, C. J., at the *London* sittings, it appeared that, by an instrument in writing bearing date the 19th *April*, 1836, the plaintiff and defendant had entered into the agreement mentioned in the declaration, for the sale of the lease, good-will, and furniture of a public-house belonging to the defendant; the furniture to be valued by two brokers, one to be appointed by each party; and one of the terms of the contract was, that possession of the premises should be given on the 3d of *May*. A deposit of 50*l.* was paid by the plaintiff when the contract was signed. The defendant was assignee of a lease of the house, under Sir *R. Sutton*; and, by a covenant inserted in the original lease, all assignments were required to be made with the consent of the lessor; but on the 30th *April*, when the assignment of the lease to the defendant was shewn to the plaintiff's attorney, it appeared that no such license had been obtained, whereupon the defendant applied to Sir *R. Sutton* to obtain a license. It also appeared that the assignment of the lease to the defendant, and the former assignees, had not been registered at the *Middlesex* Office. On the 3d of *May* the brokers had not completed the valuation of the premises; and the negotiation with the lessor for the license was not concluded, in consequence of the plaintiff's refusal to give a bond which the lessor required; but the parties and their agents met together on the 3rd, 4th, and 5th, of *May*, with a view to complete the transaction. On the 4th of *May*, the defendant had all the assignments duly registered, at the plaintiff's request; and until the 5th of *May* the agent of the plaintiff was endeavouring to procure the license from Sir *R. Sutton*; but, on the following day, the plaintiff having heard that the bond was still insisted upon, he wrote to the defendant, informing him that he considered the contract to be at an end, and demanding a return of the deposit. A few days afterwards, the license might have been obtained from Sir *R. Sutton* without giving any bond.

The learned judge left the jury to say whether the parties had postponed the completion of the agreement for a reasonable time, or only until the 5th of *May*; and the jury found that it had been postponed for a reasonable time, and a verdict was found for the defendant.

*Erle* obtained a rule nisi to set aside the verdict, and to enter a verdict for the plaintiff, or for a new trial. He contended that the admission of the evidence to shew that the day for completing the purchase had been postponed from the 3rd of *May*, for a reasonable time, was in violation of the Statute of Frauds. *Goss v. Lord Nugent* (a) was cited. In that case a vendor, by writing, contracted to sell several lots of land, and to make a good title to

them, and a deposit was paid; the vendor could not make a good title to one of the lots; and it was then verbally agreed between the parties that the vendee should waive the title as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted; and in an action brought by the vendor to recover the remainder of the purchase-money, it was held, that oral testimony was not admissible to shew the waiver of the vendee's right to a good title, inasmuch as the effect of such waiver was to substitute a new contract. He also submitted, that the evidence supported the first count in the declaration, which alleged that the defendant had no title to the premises, when he made the agreement.

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*Wilde, Serjt., and Chandless*, shewed cause.—It was not a condition precedent that possession of the premises should be given on the day mentioned in the agreement. To make it a condition precedent, the consideration must go to the whole contract. *Lang v. Gale* (b). Here the day was not material; and it was agreed by both parties that further time should be given, as much for the convenience of the vendee as of the vendor. In *Goss v. Lord Nugent* (c), the terms which were agreed upon by parol, varied the original contract between the parties, and upon that ground the case is distinguished in the judgment from *Littler v. Holland* (d), *Thrush v. Rooke* (e), and *Cuff v. Penn* (f). The alteration of the day which was made in the present case, does not vary the original contract, but is in performance of it; and the contract remains. And even if this case should be held to be within the principle of *Goss v. Lord Nugent* (c), the plaintiff is not entitled to recover back the deposit; because, if the old contract was altered, then the deposit remained subject to the conditions of the new one. This is not the case of a total failure of consideration, which entitles the plaintiff to bring an action to recover back his money; but it is a voluntary payment made with a knowledge of all the facts. The plaintiff was acting upon the new contract, because the negotiation was continued after the day originally agreed upon, had passed; therefore the plaintiff would not be entitled to recover back his deposit under the common counts. As to the other point, the plaintiff is not entitled to a verdict on the special count, because it did not appear at the trial that there was any defect in the defendant's title. The license from Sir *R. Sutton* might have been obtained, if the plaintiff had completed the contract; and although the assignments of the lease had not been enrolled, that omission was easily remedied. The evidence proved the defendant's plea, namely, that he had lawful right and title to sell and assign the lease. If the Court should hold, that a vendor's title must be complete at the very moment a contract is made, there would be few contracts of sale, to which such an objection as the present would not be applicable.

*Erle and Jardine, contrà.*—First, the plaintiff is entitled to recover upon the special count in the declaration, inasmuch as the defendant had not a lawful title to assign his lease at the time he entered into the contract; nor were the assignments duly registered. It is clear that it is the duty of the vendor, and not of the vendee, to obtain the lessor's consent to the assignment. *Lloyd v. Crispe* (h), *Mason v.*

(b) 1 M. & Sel. 111.  
(c) 5 B. & Adol. 58.  
(d) 3 T. R. 591.

(e) 1 Esp. N. P. C.  
(f) 1 M. & Sel. 21.



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*Corder* (i). Then, as to the other point, it cannot be said that the day which was fixed for the completion of the contract is immaterial. In *Lang v. Gale* (k) it was held, that the delivery of the draft of a conveyance was not a condition precedent, with respect to its delivery upon the precise day mentioned in the contract, but that the delivery of the draft was only an intermediate step in the transaction; and in *Berry v. Young* (l), Lord *Kenyon*, C. J., held, that the seller of an estate ought to be ready to produce his title-deeds at the particular day. *Wilde v. Fort* (ll) is to the same effect. In *Sugden's Vendors and Purchasers* (m), it is said, "The general opinion has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord *Kenyon*, and has never been doubted in practice. The contrary rule would lead to endless difficulties." *Lloyd v. Collett* (n), *Heard v. Wadham* (o), *Rippingall v. Lloyd* (p). Thirdly, the defendant cannot shew, that, by a subsequent parol agreement between the parties, another day was substituted. If such evidence were allowed, the provisions of the Statute of Frauds would be rendered nugatory, according to the reasoning in *Boydell v. Drummmond* (q) and *Price v. Dyer* (r). But *Goss v. Lord Nugent* (s) is precisely in point; and in that case the decisions on the 17th section of the Statute of Frauds are adverted to. In *Carrington v. Roots* (t), it was decided, that a contract for the sale of an interest in land without a note in writing, may operate as a license, although it cannot, in any way, be made available as a contract.

Cur. adv. vult.

TINDAL, C. J.—The plaintiff declared in his first count upon a special agreement for the sale, by the defendant to the plaintiff, of the good-will of a public-house, assigning as a breach of the agreement, that the defendant, at the time of the agreement, had no lawful title to assign his lease; and he declared in his second and last counts respectively, for money had and received to his use, and upon an account stated between him and the defendant. The jury found a verdict for the defendant; and a rule was obtained by the plaintiff, calling on the defendant to shew cause why the verdict should not be set aside, and a verdict be entered for the plaintiff, on the count for money had and received, or why there should not be a new trial. With respect to the first count, if the matter had rested on that count alone, we should not have thought it a case in which the verdict ought to be disturbed, for we think the breach which has been assigned in that count, and which has been traversed by one of the pleas, was not proved by the evidence given at the trial of the cause. The breach assigned is, that the defendant, at the time of making his agreement, had not lawful right or title to sell or assign over the lease to the plaintiff. But there was no proof of any invalidity or defect in the defendant's right or title to convey at the time of the agreement; the only objection taken was, that he had not, at that time, procured a license from the landlord, to assign the lease to the defendant; and that the assignments, prior to that, to himself, and also

(i) 7 Taunt. 9.  
(k) 1 M. & Sel. 111.  
(l) Cited in *Farrer v. Nightingale*, 2 Esp. N. P. C. 639.  
(ll) 4 Taunt. 334.  
(m) Vol. 1, page 420, 9th ed.  
(n) 4 Bro. C. C. 471.

(o) 1 East, 619.  
(p) 2 Nev. & Man. 410.  
(q) 11 East, 142.  
(r) 17 Ves. 356.  
(s) 5 Barn. & Ado. 58.  
(t) 2 Mee. & W. 248; S. C. Mur. & Hurl. 14.

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his own assignment, had not been then registered. But neither of these objections go to impeach the validity of the defendant's title, at the time of the agreement; for the license to assign cannot, of necessity, be obtained before the agreement is made with the intended purchaser, until which time the name of the intended assignee is not known; and as to the want of registration of some of the previous assignments, and also of that made to the defendant himself, as there was no other subsequent purchaser who had registered the assignment to himself, the objection was capable of being cured at any time before the completion of the purchase; and we think the terms of the agreement pointed only at incurable defects in the title, and not to such imperfections as are capable of being removed, and usually are removed, after the agreement is made, and whilst the title is under investigation. The right of the plaintiff, therefore, to recover a verdict will turn upon the count for money had and received, under which count the plaintiff contends he had a right to recover the sum of 50*l.*, which was advanced by him as a deposit on signing the agreement, upon the ground that the defendant had not completed the conveyance, and given the possession of the premises to the plaintiff, on or before the 3rd of *May*, according to the stipulations of the agreement. The defendant, on the other hand, contends, that the day specified in the agreement was not an essential and material part of the contract, and that both the plaintiff and defendant, in the completion of the contract, acted upon the footing that the precise day was not material; and by their course of dealing after that day with each other, must be taken to have substituted a performance within a reasonable time after the 3rd of *May*, in the place of a performance on that precise day; and the jury were of that opinion upon the point being left for their determination; and the question which was reserved for our consideration, and which has been argued before us, is, whether such a finding is consistent with the rules of law. It may be taken in this case to have been proved at the trial that the parties were neither of them ready to carry the contract into effect, on the 3rd of *May*, not only on account of the objections that were taken to the title, and which were then in a course of being removed, but also because, at that time, the brokers had not completed their valuation; and it may further be taken that both upon the 3rd, 4th, and 5th of *May*, the agent of the plaintiff, the buyer, (who appeared to have taken that part of the business upon himself,) was endeavouring to procure the proper license from the ground landlord for the assignment of the lease; but that, on the 6th, being informed by the landlord's agent that a bond, which had been objected to, would be required to be given by the purchaser, he writes to the defendant on the same day, that he considers the contract at an end, and demands the return of the deposit. Within a few days after this letter, and within what appears to us to be a reasonable time for that purpose, the objections would have been removed. So that the question, as was before stated, is this, can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? And we are of opinion that it cannot. This is an agreement for the sale of land, upon which, by the Statute of Frauds, section 4, no action can be brought, unless it is in writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorized. Now we cannot get over the difficulty which has been pressed upon us, that, to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a

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subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time, contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing, signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds. Such was the opinion expressed by Lord Chancellor *Hardwicke* in *Partridge v. Powlett* (a), of Sir *William Grant*, master of the rolls, in *Price v. Dyer* (b). And we think the reasoning upon which the judgment of the Court of King's Bench proceeds, in *Goss v. Lord Nugent* (c), goes directly to the point that the evidence now under discussion is inadmissible. Upon the ground, therefore, that the verdict of the jury in favour of the defendant is founded on that evidence, we think there must be a new trial; to which, however, it will be useless to have recourse, unless the defendant can remove the difficulty, by producing evidence in writing as to the enlargement of the time, or unless for the purpose of putting this question upon the record.

Rule absolute (d).

- (a) 2 Atk. 383.  
 (b) 17 Ves. jun. 356.  
 (c) 5 B. & Adol. 58.

- (d) See *Palmer v. Temple*, 1 Har. & Wel. 702; *Harvey v. Graham*, 2 Har. & Wel. 146.

June 9.

### PERCEVAL v. CONNOR.

A rule nisi having been obtained by the defendant, after a verdict for the plaintiff, to set aside a writ of trial upon the ground that the date of the writ of summons was incorrectly stated, the Court suspended the rule to enable the plaintiff to apply for leave to amend the record.

A RULE nisi had been obtained to set aside a writ of trial upon the ground of a variance, in the writ of trial, of the date of the writ of summons.

The writ of summons was issued on the 22nd of June, and in the writ of trial it was stated that "the plaintiff impleaded the defendant on the 6th of July." The defendant's attorney attended at the trial, and pointed out the variance, but the cause proceeded, and a verdict was found for the plaintiff.

*E. James* shewed cause, and contended that the record was conclusive evidence of the time of issuing the writ, and he referred to the form of the writ of trial given in Reg. Hil. T. 4 W. 4, Sch. No. 5.

*Thomas*, in support of the rule, cited *Whipple v. Hanley* (a) and *White v. Farrer* (b).

TINDAL, C. J.—The justice of the case will be satisfied if we suspend this rule for the purpose of enabling the plaintiff to apply to the Court for leave to amend the record on payment of costs.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule suspended accordingly (c).

- (a) 1 Mee. & Wels. 432; S. C., 2 Gale, 56.  
 (b) 2 Mee. & Wels. 88. S. C. nom. *White v. Perrers*, Mur. & H. 39.  
 (c) See *Blissett v. Tenant*, 1 Arnold, 6.

## DOE d. NORTH v. HARRIET WEBBER.

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**EJECTMENT** by a mortgagee. At the trial, before *Williams, J.*, at the *Somerset Summer assizes* for 1836, the following appeared to be the facts of the case:—In 1817, one *William Webber*, the husband of the defendant, borrowed 800*l.* from the lessor of the plaintiff, and the ejectment was brought to recover the mortgaged premises, on default of payment. *W. Webber* died in possession of the premises in 1828, and since that time the defendant continued in possession, without paying any interest. The evidence given by the lessor of the plaintiff to prove his title, consisted of an indenture of lease and release dated the 15th and 16th *July*, 1817, whereby the premises sought to be recovered were conveyed to him by way of mortgage. The release purported to be made between the said *W. Webber* of the one part, and the lessor of the plaintiff of the other part, and it recited, that the said *W. Webber*, by a certain grant, by copy of court roll, of 27th of *March*, 1786, and by divers mesne acts, &c., then stood lawfully or equitably seized of certain messuages, tan yard, and premises; to hold for the lives of *J. Hancock, P. Hancock, and W. Hancock*; and that the said *W. Webber* had applied to the said *R. North* to advance him 800*l.* on a mortgage and security of the said copyhold premises, and the fee simple and inheritance thereof. It was then witnessed that in consideration of 800*l.* the said *W. Webber* did grant, bargain, sell, assign, and set over unto the said *R. North*, his executors, administrators, and assigns, all the said premises, and the copy of court roll, and other deeds to the same belonging; to hold to the said *R. North*, his executors, administrators, and assigns, during the natural lives of the said *J. Hancock, P. Hancock, and W. Hancock*; subject to the rents, heriots, &c., due in respect of the same. And after reciting certain indentures of lease and release of the 24th and 25th of *March*, 1812, made between the Bishop of *Rochester*, of the first part, *John King*, of the second part, the said *W. Webber*, of the third part, and *Edward Boucher*, of the fourth part, which recited that the said *W. Webber* had contracted with the said Bishop of *Rochester* for the absolute purchase of the inheritance in fee simple, of the hereditaments and premises thereafter mentioned; it was witnessed, that for the considerations therein mentioned, the said *J. King*, by the direction of the said bishop, testified as thereafter mentioned, did bargain, sell, alien, and release, and the said bishop did grant, bargain, sell, alien, release, ratify, and confirm, unto the said *W. Webber*; all those messuages, tan-yard, and premises, thereafter more particularly described, parcel of the manor of the prebend of *Wiveliscombe*; to hold the same unto the said *W. Webber*, his heirs and assigns for ever. And it was further witnessed by the indenture of release of the 16th *July*, 1817, that in consideration of *W.*) to hold the same to the mortgagor, his heirs and assigns for ever; and the mortgage deed then witnessed that the mortgagor granted and released the premises in fee, subject to the usual proviso for redemption. *Held*, that there was no sufficient evidence furnished by the recital that there had been any enfranchisement of the copyhold.

3. Whether the above recital was evidence, by way of estoppel, against the widow in possession of the mortgagor, *quære*.

4. Where, after a verdict for the plaintiff in ejectment, an objection, which had no bearing on the merits of the case, was successfully made to the proof of title given by the plaintiff, the Court refused to enter a nonsuit, but ordered a new trial.

1. In ejectment brought by a mortgagee against the widow of the mortgagor, the lessor of the plaintiff proved an assignment by way of mortgage, of copyhold premises by lease and release, and not by any surrender to the lord. *Held*, that the lessor of the plaintiff had only an equitable interest, and that he could not maintain the action.

2. Where a mortgage of copyhold premises by lease and release recited, that by indentures of lease and release, the mortgagor (a copyholder for lives,) had contracted with the Bishop of *Rochester* for the absolute purchase of the inheritance in fee simple of the copyhold premises, and that the Bishop of *R.* had granted and released the same (parcel of the manor of the prebend

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tion of the said 800*l.* so lent, the said *W. Webber*, did grant, bargain, sell, alien, release, and confirm, unto the said *R. North*, his heirs, and assigns, all those the said messuages, tan yard, and premises; unto the use of the said *R. North*, his heirs and assigns, for ever. And it was further witnessed, that the said *W. Webber*, in pursuance of a power vested in him by the said recited indenture of the 25th of *March*, 1812, did direct, limit, and appoint, unto the said *R. North*, his heirs, executors, and assigns, for ever, all those the aforesaid messuages and premises, thereinbefore granted, subject to the usual proviso for redemption, on payment of 800*l.* in *December* then next, with interest. Covenants from the said *W. Webber*, that he was lawfully seised and lawfully and equitably possessed of the copyhold premises for the lives of the said *J. Hancock*, *P. Hancock*, and *W. Hancock*; that he had power to grant in fee; for peaceable enjoyment free from incumbrances; and for further assurance.

It appeared that the persons for whose lives the premises were held were all living at the time of the trial.

It was contended, on behalf of the defendant, that the lessor of the plaintiff had not proved any legal interest in the premises, inasmuch as a copyhold would not pass by a common law conveyance by lease and release: and that if it was supposed that the Bishop of *Rockester* had enfranchised the premises, then that the recitals of the conveyance of the 24th and 25th *March*, 1812, were not evidence against the defendant, but that the deeds ought to have been produced. It was also contended, that the recitals did not shew that the premises had been enfranchised. A verdict was found for the lessor of the plaintiff, with leave reserved to the defendant to move to enter a nonsuit.

*Rogers* obtained a rule nisi accordingly in *Michaelmas* Term.

*Erle* shewed cause.—The recitals in the mortgage deed shew that the copyhold had been enfranchised, and every thing is to be presumed in favour of the mortgagee. The defendant, being the widow of the mortgagor, is estopped from disputing the validity of the conveyance to the mortgagee, and the recital of the conveyance of the 24th and 25th *March*, 1812, is evidence against her. The covenant by the mortgagor, that he was seised in fee of the premises without incumbrance, is conclusive as against the defendant. In *Wakeford's case* (a), “The Earl of *Bedford*, lord of the manor of B., sold the freehold interest of a copyholder of inheritance unto another, so as it is now no part, but divided from the manor, and afterwards the copyholder doth release to the purchaser. It was holden, by the Court, that by this release the copyhold interest is extinguished and utterly gone.” In *Blemmer Hassel v. Humberstone* (b) it is said, by Lord *Hobart*, “That if a copyholder come into court and says that he is weary of his copyhold, and requests the lord to take it, that is a surrender; for between the lord and the tenant a conveyance shall not need to be according to the custom, for the copyholder hath no other use of the custom but only to convey the land to another.” *Lane's case* (c).

*Rogers* and *Bere* in support of the rule. The lessor of the plaintiff was bound to shew himself clothed with the legal title. By the first part of the

(a) Leonard, 102.  
 (b) Hutton, 65.

(c) 2 Rep. 16 b.

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mortgage-deed it appeared that nothing but an equitable interest passed to the lessor of the plaintiff, inasmuch as no surrender of the premises was made, and a conveyance of copyhold premises cannot be made by a lease and release. Then if the legal title passed at all, it must be by reason of an enfranchisement of the copyhold premises, by the conveyance of 24th and 25th *March*, 1812. But the recital of those deeds is not evidence as against the defendant. *Co. Lit.* 352 b.; *Viner's Abr.* tit. Estoppel (A. 2.); *Doe d. Rogers v. Brooks* (a). And if it is evidence, then it does not appear that the Bishop of *Rochester* was lord of the manor. It rather seems that the bishop was seized *jure ecclesiæ*, as the premises are described as "parcel of the manor of the prebend of *Wiveliscombe*." If he was seized in right of his prebend only, he could not enfranchise the premises; nor was the mortgagee in a situation to take an enfranchisement during the lives of the *cestui que vies*. *Dancer v. Evett* (e); *Howard v. Bartlet* (f). The mortgagor himself would not have been estopped from taking this objection; and even if that were not so, the defendant is not shewn to have paid any interest on the mortgage-money, or in any other manner to have acknowledged the title of the lessor of the plaintiff. *Gaunt v. Wainman* (g).

*Cur. adv. vult.*

TINDAL, C. J.—This was an action of ejectment brought by a mortgagee against the widow of the mortgagor, in which it appeared that the mortgagor died in possession of the mortgaged premises in 1828, and the widow continued in possession after the death of her husband up to the time of the ejectment brought. The objection taken at the trial on the part of the defendant, and upon which the learned judge gave leave to the defendant to enter a non-suit, was this, that the mortgaged premises were copyhold, and that the only title set up by the lessor of the plaintiff was an assignment of the copyhold premises by a common law conveyance of lease and release, and not by any surrender to the lord according to the custom of the manor; and we think it appears from the deed of release produced by the plaintiff at the trial, and which was the only evidence on which he relied, that the premises in question were of copyhold tenure, for they are expressly described in various parts of the deed as being copyhold at the time of the execution of the deed; and as the plaintiff did not produce any surrender, according to the custom of the manor, but relied entirely upon the deeds of lease and release produced by him, we think that, upon his own shewing, he had not any legal interest, but an equitable interest only in the premises, and was, therefore, not in a condition to maintain an ejectment. The plaintiff, in answer to this objection, has contended, that, if it does not appear expressly upon the face of the deed, yet that it does, by necessary inference, that an enfranchisement of this copyhold had taken place by a conveyance, in 1812, of the freehold premises from the then lord of the manor to the mortgagor and his heirs. But upon reference to the deed as recited in the mortgage, and even admitting that such recital is evidence by way of estoppel against the present defendant, the widow, as coming in by claim under her husband, (of which, however, there may be considerable doubt,) still we

(d) 3 *Ado.* and *Ellis*, 513. S. C., 1 *Har.*  
& *Wol.* 400.

(e) 1 *Vernon*, 392.

(f) *Hobart*, 181.

(g) 3 *Bing.* N. C. 69. S. C., 2 *Hodges*,  
184.

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think there is no sufficient evidence furnished by the deed that there has been any enfranchisement. An enfranchisement is made by a common law conveyance of the fee simple of the particular tenement by the lord of the manor to the copyholder. But upon the recital of this deed it does not distinctly appear that the Bishop of *Rochester*, the releasor of the inheritance, was seised of the fee simple of the manor; and if he had only a limited interest in the manor, he could not enfranchise. Again, it appears from the deed of release that the premises were parcel of the manor of the prebend of *Wiveliscombe*, from which, unexplained, the inference would be, that the lord of the manor was seised in right of his prebend only, in which case he would be prevented by the restraining statutes from parting with the fee, and, consequently, from enfranchising the copyhold, unless power had been given to him by some private act of parliament, of which there was no evidence. We think, therefore, that the plaintiff has, by his own evidence, shewn the infirmity of his own title; and that the mortgagor may take advantage of these objections, which amount, in fact, to this, that the plaintiff is not the legal mortgagee. But as it is probable, that, upon another occasion, the plaintiff may be able to supply these defects, which have no bearing on the merits of the case, and as it would be an useless expense to the parties to direct a nonsuit to be entered, and thereby to compel the mortgagee to commence another ejectment, we think it right, under the circumstances, to direct a rule to be made absolute for a new trial, upon payment of costs of the former trial by the lessor of the plaintiff.

Rule absolute accordingly.

May 22.

MOON v. the Guardians of the Poor of the WITNEY Union.

The defendants employed an architect to draw plans for a workhouse, and the architect employed the plaintiff, a surveyor, to calculate the quantities of the materials. The defendants afterwards advertised for tenders to build the workhouse, and they gave notice that copies of the quantities might be obtained, and that the successful competitor would be required to pay for calculating them. The defendants subsequently determined not to build the workhouse. In an action brought by the plaintiff against the defendants for work and labour, it was proved that architects were accustomed to employ a surveyor to calculate the quantities. *Held*, that the action was maintainable, as the architect was the agent of the defendants, and had authority to bind them.

ACTION for work and labour, as a surveyor, with the common counts. *Plea*—the general issue. At the trial, before *Tindal*, C. J., the following facts were in evidence. The defendants employed one *Kempthorne*, an architect, to prepare the plans and specifications of a workhouse which they intended to build. *Kempthorne* prepared the plans, and, after they had been approved by the defendants, he employed the plaintiff, who was a surveyor, to make out the quantities for the use of the builders; and on the 30th of *April*, 1835, the following form of a notice for tenders, was sent by *Kempthorne* to the clerk of the defendants, who caused the same to be printed and circulated:—"To builders. The board of guardians of the *Witney* Union, *Oxon*, are desirous of receiving tenders for the erection of the new workhouse at *Witney*. The plans and specifications may be seen at the office of Mr. *Kempthorne* or Mr. *Leake*, clerk to the board. Sealed tenders must be sent to Mr. *Leake* before the 4th of *June*."

On the 14th of *May*, 1835, *Kempthorne* sent the specifications to the clerk, and desired him to shew the builders the following instructions:—"14th *May*, 1835. The builders desirous of contracting for the erection of the *Witney* Workhouse are informed, that the quantities of the works are now

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being taken out for their use, and will be ready by the 28th instant. Builders requiring a copy of the same are requested to leave their names, with the sum of 2*l.* 2*s.*, at Mr. *Kempthorne's* office, or at Mr. *Leake's*, clerk to the union. *Witney*, before the 26th instant. The successful competitor will have to defray the expense of taking out the quantities, the charge for which will be stated at the foot of the bill of quantities, when delivered. *Sampson Kempthorne.*" Before any tender was accepted, the defendants declined to proceed with the building, and *Kempthorne* having sent in his bill, to the amount of 178*l.*, they refused to pay it, on the ground that the charges were exorbitant. The bill was made out, "for professional charges for the working drawings and specifications of the workhouse, together with the surveyor's bill for making out the quantities of the same, for the use of the builders." *Kempthorne's* portion of the charges amounted to 113*l.*; and the plaintiff's bill for taking out the quantities, which amounted to 65*l.*, was annexed. After some discussion between *Kempthorne* and the defendants, 80*l.* were paid in liquidation of his account.

The present action was brought by the plaintiff to recover the 65*l.* for taking out the quantities.

*Kempthorne* was examined on behalf of the plaintiff, and he proved that it was usual in the trade, for architects to employ a surveyor to take out the quantities of an intended building, and that the expense was defrayed by the builder who obtained the contract; and that by means of these quantities, the builders were enabled to send in tenders upon a more certain basis than they could without them. He also said, that, when the quantities were furnished, there was more competition among the builders. Two surveyors confirmed these statements, and said, that sometimes two surveyors were employed to take out the quantities; one by the architect, and the other by the builder.

The jury found a verdict for the plaintiff for 65*l.*

*Talfourd*, Serjt., in *Hilary* Term, obtained a rule *nisi*, pursuant to leave reserved, to set aside the verdict, and to enter a nonsuit, or for a new trial. He contended, that there was no privity of contract between the plaintiff and the defendants, and that the evidence did not shew an universal usage which entitled the plaintiff to maintain this action; but that the plaintiff's remedy was against *Kempthorne*, who employed him.

*Wilde*, Serjt., and *Willmore*, shewed cause.—It was proved, at the trial, by the evidence of surveyors and architects, that it was customary for an architect to employ a surveyor, to calculate the quantities, and that it was very much to the advantage of parties who advertised for tenders, that the quantities should be taken out; indeed, that it was absolutely necessary it should be done. If the building had been completed, it was stipulated that the person whose tender was accepted should pay the surveyor; but as the defendants declined to proceed further in the undertaking, they prevented the plaintiff from obtaining payment in this manner. Therefore, there was an implied condition, that if the work did not proceed, the defendants should pay for the quantities. The work was useful to the defendants; and when they employed *Kempthorne* to draw the plans, they gave him an authority, as their agent, to engage a surveyor to make out the quantities. In *Webb v.*



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*Rhodes* (a), a lessee was compelled to pay an attorney for preparing an agreement for a lease, which had been prepared by the attorney of the lessor, who died before the lease was executed, although no special retainer was proved. *Grissell v. Robinson* (b), is an authority to shew that evidence of the custom was properly received.

*Talfourd*, Serjt., and *Chilton*, in support of the rule.—The plaintiff would have been entitled to bring an action against the successful competitor, if the work had proceeded; but, as it did not proceed, *Kempthorne* was the only person whom the plaintiff could sue. If the defendants are liable at all, it is to *Kempthorne*; but there is no privity whatever between the plaintiff and the defendants. *Rigley v. Daykin* (c) is very analogous to the present case. There one employed an attorney to raise money on mortgage, and the attorney employed another attorney, who agreed to advance the money on behalf of a client; but the negotiation ultimately failed; and it was held, that the attorney of the intended mortgagee could not sue the mortgagor for the costs, although it was proved to be the practice, for the proposed borrower to pay the expenses which had been incurred. Here the builders who tendered were not compelled to take a copy of the quantities; and it does not appear that the defendants were aware that *Kempthorne* had employed any surveyor to take them out, or that they had authorized him to do so.

TINDAL, C. J.—This question comes round to this, whether there was such a contract existing, as entitled the plaintiff to sue the defendants in an action for work and labour. It is not pretended that the parties were ever introduced to each other; the question is, whether *Kempthorne* had not, by the scope of his authority as an agent, a power to employ a surveyor to make out these quantities. That was the point left to the jury, and they determined it in favour of the plaintiff, after hearing the evidence, and a speech, full of just observations, from the defendant's counsel. They have found affirmatively, that there was an usage for architects to have the quantities made out by surveyors; and the maxim of our own, as well as of the civil law, holds good. *In contractis tacite insunt que sunt moris et consuetudinis*. That being so, it appeared that the quantities were beneficial to the builders, and that, by having them, they were enabled with more confidence to make out the estimate for a building. The consequence of this was, that more competitors were induced to send in tenders; and the tenders would be based upon a calculation which was not likely to mislead the parties. Besides this, there was an intimation given to the defendants, in the communication made to their clerk, on the 14th May, 1835, that the quantities were being taken out, and that the successful competitor would be required to pay the expense. When the defendants had this intimation before them, and when they afterwards, and perhaps most laudably, declined to proceed with the intended building, the only inference to be drawn is, that they were themselves to pay a charge which they had authorised their agent to incur. It appears, too, that *Kempthorne*, subsequently sent his account to the defendants, and included the plaintiff's demand in a separate charge; here they had most express notice of the two

(a) 3 Bing. N. C. 732; S. C. 3 Hodges, 138.

(b) 3 Bing. N. C. 10; S. C. 2 Hodges, 138.

(c) 2 Young & J. 83.

matters, but they came to a compromise with the architect, without noticing the other charge, although it would then have been open for them to have said, that they did not recognise the demand made by the plaintiff. It is objected that a contract cannot shift, so as to leave two persons liable at the same time, and I am far from saying that may not be so, in some cases. But this was a conditional contract; the successful competitor was to pay, in the first instance, but there was also a tacit agreement that if the work was not suffered to proceed, so that there was no successful competitor, then that the plaintiff should have a remedy against those persons who had caused him to be put in motion. This rule must, therefore, be discharged.

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PARK, J.—The question is—is the plaintiff to be paid for his work, and by whom? The question for the jury was, whether there was sufficient evidence of an implied contract between the plaintiff and the defendants. It seems to me, that *Kempthorne* was authorised to enter into a contract with a surveyor for the purpose of having these quantities calculated. It is also impossible to suppose, that when the defendants compromised with *Kempthorne* for the payment of his bill, they could have imagined that it included the surveyor's charges; and it does not appear that they then made any objection to the plaintiff's demand.

BOSANQUET, J.—I am of opinion that there is no ground for disturbing this verdict. The jury must be taken to have found that all which was done by *Kempthorne*, was done according to the usage and custom of the trade. Here the agent was authorised to make plans of the building, but he did not take out the quantities, and the defendants knew that they were taken out by somebody, because they gave notice that copies might be obtained. If, after the advertisement was published, the defendants declined to proceed with the building, so that there could be no successful competitor, who was to pay the plaintiff but the defendants, who must be taken to have authorised *Kempthorne* to employ him?

COLTMAN, J.—The plaintiff's case is, that if there was a successful competitor, he was to pay for taking out these quantities; but if there was no successful competitor, then that the defendants were to pay for them. The defendants say, that if there was no successful competitor, the plaintiff was not to be paid any thing, but that it was a mere speculative contract on the part of the plaintiff. But there was no evidence to support this supposition; and the general rule is, that a person who does work is to be paid for it by some person. When the nature of an architect's employment is considered, I think there was sufficient evidence to induce the jury to find a verdict for the plaintiff. An architect is not accustomed to take out quantities, or to make advances in money. If the defendants did not intend to pay the plaintiff's demand, they ought to have given a specific notice to that effect, to *Kempthorne*, before his account was settled.

Rule discharged.

May 23.

## DOR d. WADE v. ROE.

On a motion for judgment against the casual ejector, the affidavit of the service of the declaration and notice ought to state that it was explained to the tenant; it is not sufficient to say it was read over.

**FISH** moved for judgment against the casual ejector.—The affidavit of the service of the declaration stated, that the declaration and notice were read over to the tenant; but it did not also state that the intent and meaning of the service had been explained.

**TINDAL, C. J.**—That is not sufficient; a proceeding in ejectment is very unintelligible to common people, and it is not desirable to establish a new form for the affidavit of service (a).

**BOSANQUET, J., and COLTMAN, J.,** concurred.

Rule refused (b).

(a) See Tidd's Forms, Chap. XLVI. (a. 31.)

(b) Overruling *Doe v. Roe*, 1 Dow. P. C. 428; and see *Doe d. Doucnes v. Roe*, 1 Har. & Wol. 671.

June 12.

## HUNTER v. WHITFIELD.

Where a plaintiff proceeded to outlawry without endeavouring to find the defendant's residence by applying to persons with whom he knew the defendant was acquainted, it was held, that this was no ground for reversing the outlawry without costs.

**W. H. WATSON** obtained a rule nisi to reverse the outlawry of the defendant without payment of costs. The plaintiff, who had formerly been the defendant's attorney, sued out a writ of *capias* in May, 1836, and in December, a *capias utlagatum* was issued. It was stated in the defendant's affidavit, that he had resided in France for three years, and that the plaintiff was well acquainted with several persons who could have given information respecting his residence; and that the plaintiff knew that one *Murray* paid an annuity to the defendant. The plaintiff swore in his affidavit that he had not known the defendant's residence during the last three years.

**Crowder** shewed cause, and contended, that the defendant had not established a case which would induce the Court to set aside the outlawry, except upon the usual terms.

**Watson, contrâ**, submitted that the plaintiff ought to have made inquiries to ascertain the defendant's residence, before he proceeded to outlawry. He cited *Pigou v. Drummond* (a), where the court set aside proceedings in outlawry, without costs, on the ground that the plaintiff knew that the defendant had an attorney in this country.

**TINDAL, C. J.**—In that case we thought that there had been an abuse of the process of the court. This does not appear to me to be within that class of cases in which an outlawry is reversed without costs.

(a) 1 Bing. New Cases, 354.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

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Rule absolute on payment of costs, and putting in bail in the alternative, to pay or render (b).

(b) See *Adlams v. Colebatch*, 2 Salk. 495. Archbold's Practice, 489.

### FINLEYSON v. MACKENZIE.

May 25 & 27.

**D**EBT by the indorsee against the acceptor of a bill of exchange, for 78*l.* 13*s.* 6*d.*, drawn by one *J. Gilles*, and payable three months after date.

In debt on a bill of exchange for 78*l.* 13*s.* 6*d.* the defendant pleaded payment into court of 5*l.* 3*s.* 6*d.* and that he was not indebted to the plaintiff to a greater amount in respect of the cause of action in the declaration mentioned. The plaintiff having taken issue on this plea, *held*, that the plea would have been bad on special demurrer as amounting to *nil debet*, in contravention of the new rules of pleading; but, after a verdict found for defendant, the Court refused to disturb it.

*Pleas*—First, a payment of 5*l.* 3*s.* 6*d.* into Court, and that the defendant was not indebted to the plaintiff to a greater amount than 5*l.* 3*s.* 6*d.* in respect of the causes of action in the declaration mentioned: second, except as to 5*l.* 3*s.* 6*d.*, that the defendant received no consideration or value for accepting the bill, and that the plaintiff retained the bill, in violation of good faith, after obtaining it for the purpose of discount. The plaintiff traversed the first plea, except as to the payment into court, and replied *de injuriâ* to the second plea.

At the trial, before *Vaughan, J.*, *Gilles*, the drawer of the bill, proved that the bill was entrusted with him by the defendant, to get it discounted; and that he, *Gilles*, applied to the plaintiff for the purpose of raising the money; but that the plaintiff, instead of discounting the bill, retained it as a security for a debt of 40*l.* due to him from *Gilles*, and advanced only 5*l.* 3*s.* 6*d.* The jury found a verdict for the defendant on both issues.

*Wilde*, Serjt., obtained a rule *nisi* for a new trial, or to enter judgment for the plaintiff *non obstante veredicto*, on the ground that the first plea afforded no answer to the action, as it amounted to *nil debet*, to all the demand beyond 5*l.* 3*s.* 6*d.* in contravention of the new rules of pleading.

*Kelly* shewed cause.—As to the first plea. It is true, that, by the new rules, in actions of debt on bills of exchange, the plea of *nil debet* or *nunquam indebitatus*, is not allowed, Reg. Hil. T. 4 Wm. 4, 3, 4. But the form of the plea of payment which is given in the same rules, is applicable to actions of debt on bills of exchange as well as to other actions. It is directed that "when money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis*." Reg. Hil. T. 4 Wm. 4, 17. Here the first plea is drawn exactly according to this form, and indeed the defendant was compelled to pursue it. If he had not done so, but had proceeded to set out the other facts specially, then it would have been objected that the form was not observed. Therefore it must be assumed that when payment is pleaded to a bill of exchange, the general issue is to be allowed, as to the remainder of the demand; and the defendant is in the same situation as he was in before these rules, if he paid money into Court as to part of the demand, and pleaded the general issue as to the remainder. These rules have the force of an act of parliament, and it is directed, without except-

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ing bills of exchange, that in all cases, the form of the plea of payment shall be according to the form given in Reg. 17. The second plea was merely added *ex majori cautela*. [Kelly was about to support the second plea, when he was stopped by the Court. ]

*Wilde*, Serjt., in support of the objection to the first plea.—The first plea admits the drawing and accepting the bill, and also that the plaintiff gave good consideration for it; and yet it is now contended that the defendant is entitled to a verdict, although only 5*l.* 3*s.* 6*d.* was paid, upon a bill for 78*l.* 13*s.* 6*d.* It is obvious, that the defendant ought to have gone on to shew a payment or release of the residue of the bill. If this form of pleading were allowed, then, in all actions on bills of exchange, the defendant may pay one shilling into court, and have the benefit of the general issue, as before the new rules of pleading. The rules 2, 3, & 4, of Hil. T. 4 Wm. 4, shew expressly that a plea of *nil debet* or *nunquam indebitatus* cannot be pleaded in actions on bills of exchange, but it is required that “the defendant shall deny,” specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.”

TINDAL, C. J.—This case may be decided upon the first plea. I am ready to admit that, upon special demurrer, the plea would be bad, as being in direct violation of the new rules of pleading, which take away the plea of the general issue in actions of debt and assumpsit, on bills of exchange. But this application is made after a verdict for the defendant upon an issue which the plaintiff has himself raised. The defendant pleaded, that originally only 5*l.* 3*s.* 6*d.* was due, and the plaintiff chose to go to trial upon that allegation. It resembles the case of *Rawlins v. Danvers* (a), where the defendant in an action on a bail-bond having pleaded *nil debet*, and the plaintiff did not demur, but took issue upon the plea; Lord *Ellenborough* held, that the defendant was let into any defence which he could prove. I am, therefore, of opinion, that it is too late to object to this plea; and this rule must be discharged.

PARK, J., concurred.

VAUGHAN, J.—I am of the same opinion. I do not think we can treat the first plea as a nullity; but, as the plaintiff has put the allegation in issue, the verdict ought to stand.

COLTMAN, J.—It is not easy to see what the operation of the 17th rule is, in a case of this description, when it is contrasted with the 2nd, 3rd, and 4th rules. It appears to me that the plea is clearly bad in form, but, for the reasons already given, I agree that this rule must be discharged.

Rule discharged (b).

(a) 5 Esp. N. P. C. 38.

(b) See *Bradley v. Milnes*, 1 Hodges,

158, and *Rand v. Vaughan*, 1 Hodges, 173.

## DOE d. BRAME v. MAPLE.

May 30  
&  
June 1.

**EJECTMENT** by a mortgagee. At the trial, before *Coltman, J.*, at the last *Suffolk* assizes, the following appeared to be the facts of the case:—

The lessor of the plaintiff proved that the corporation of *Ipswich* granted a lease of the premises sought to be recovered, to one *Ellis*, in 1796; and that the defendant came into possession in 1818, and subsequently acknowledged that he was tenant to the corporation. A deed of assignment of mortgage was then proved, bearing date the 11th *October*, 1815, made between one *Barthrop*, of the first part; the corporation of *Ipswich*, of the second part; and one *Pytches*, through whom the lessor of the plaintiff claimed, of the third part; wherein, after reciting that, by indenture of mortgage, dated in 1775, the corporation of *Ipswich* had mortgaged the premises for 900 years as a security for 1500*l.*, and that, by divers mesne assignments, which were also recited, the mortgage term was vested in *Barthrop*; it was witnessed, that, in consideration of 1500*l.* paid to *Barthrop*, he, the said *Barthrop*, by the direction of the corporation, did bargain, sell, assign, transfer, and set over, and in consideration of 10*s.*, the said corporation did grant, bargain, sell, and assign, ratify, and confirm, the said mortgaged premises, unto the said *Pytches*; to hold for the then residue of the said term of 900 years, with a proviso for redemption, on repayment of the said 1500*l.* and interest thereon.

This deed was stamped with a 3*s.* stamp; but it was objected, on behalf of the defendant, that, inasmuch as the recitals were not evidence against him, and as he was not estopped from denying that the corporation were not seised of the premises in 1775, the lessor of the plaintiff was compelled to rely upon the conveyance of the 11th *October*, 1815, as a grant from the corporation; and that it therefore required an *ad valorem* stamp of 6*l.*, as an original mortgage.

In ejectment by the assignee of a mortgage against the tenant of the mortgagor, the lessor of the plaintiff proved a deed of assignment which recited a mortgage of certain premises for 900 years as a security for 1500*l.*, and it was witnessed, that in consideration of 1500*l.* paid to the mortgagee, he transferred the mortgaged premises to the lessor of the plaintiff, and the mortgagor, in consideration of 10*s.*, assigned, ratified, and confirmed the same. *Held*, that a stamp of 3*s.* was sufficient, the seisin of the mortgagor having been proved.

*Kelly* obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit, upon the above question as to the sufficiency of the stamp; and also upon the other points, which the Court did not determine.

*Palmer* shewed cause.—It was sufficient for the lessor of the plaintiff to prove the deed of 1815, and that clearly shewed a good title in the lessor of the plaintiff. *Doe d. Rogers v. Brooks* (a). It is, on the face of it, an assignment of the mortgage, and the words of confirmation by the corporation, do not make it amount to an original mortgage. No further sum was advanced, and the case comes precisely within the words of the Stamp Act, which relate to assignments of mortgages; 55 Geo. 3, c. 184, tit. *Mortgage*. The recital of the mortgage, is *prima facie* evidence that there was a valid deed of that date which was properly stamped, *Quin v. King* (b).

*Kelly* and *O'Malley*, in support of the rule.—If the deed of 1815 is treated as a grant or demise of the premises from the corporation of *Ipswich*, then it requires an *ad valorem* stamp as an original mortgage. If it is not a grant,

(a) 3 *Ado. & Ellis*, 513; *S. C.* 1 *Har. &*(b) 1 *M. & Wels*, 44; *S. C.* 1 *Galc*, 407.

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but a mere confirmation of title, then there was no sufficient evidence of the title of the lessor of the plaintiff, because the recitals in the deed of 1815 are not evidence against the defendant; and there is no proof that the corporation was seised in 1775, when the mortgage was executed. There is no demise from the corporation stated in the declaration; therefore, the lessor of the plaintiff relied entirely upon his title as assignee of the mortgage. In *Doe d. Rogers v. Brooks (c)*, the seisin of the mortgagor was proved.

TINDAL, C. J.—This case is capable of a very simple solution. It is an action of ejectment, brought by the assignee of a mortgage, against the tenant of the mortgagor. The lessor of the plaintiff claimed under an assignment of a term of 900 years by way of mortgage, which was originally granted by the corporation of *Ipswich*. The deed of assignment, which was dated in 1815, was in evidence; and the only question is, whether it appears to be properly stamped. On the part of the defendant it is contended, that, if the lessor of the plaintiff availed himself of this deed to shew a grant of the premises from the corporation, it must then be considered as an original mortgage, which requires an *ad valorem* stamp. On the part of the lessor of the plaintiff, it is said to be a mere assignment of the mortgage, which requires only a 35s. stamp. Upon looking at the deed, and also at the 55 Geo. 3, c. 184, I am of opinion, that it is properly stamped. When such an objection is taken, I know of no other way of deciding it, than by looking at the operative part of the deed. Now the 55 Geo. 3, c. 184, title *Mortgage*, charges an *ad valorem* duty, "where the mortgage shall be made as a security for the payment of any definite and certain sum of money, advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable." It appears, upon the face of this deed, that it is not a mortgage, for there was no sum of money lent, nor was there any thing previously due from the corporation, to the assignee of the mortgage. The original mortgage from the corporation is recited; and then, in consideration of 1500*l.* paid to *Barthrop*, he transfers the security; and, in consideration of 10*s.*, the corporation grant, ratify, and confirm the assignment for the residue of the term of 900 years. This, then, is an assignment of a mortgage. The statute requires a stamp of 1*l.* 15*s.* upon any transfer or assignment of any mortgage, "provided no further sum of money or stock be added to the principal money or stock already secured." The present case comes precisely within this definition; and that puts an end to the question. I find nothing in the act to shew that when an additional security is thrown in, a further stamp would be required; but it is unnecessary precisely to decide that point, or to consider the questions which have been argued as to the doctrine of estoppel.

PARK, J., and VAUGHAN, J., concurred.

COLTMAN, J.—This is a very clear case. The party who makes an objection to the stamp is bound to shew that it is insufficient; and here the defendant cannot do that without referring to the recitals; and *Doe d. Rogers v. Brooks (c)* shews, that, if the recitals are used by one party, they may also be used by the other.

Rule discharged.

## LACEY v. WALROND, Administrator of WALROND.

June 5 &amp; 6.

**ASSUMPSIT** for work and labour performed by the plaintiff, as an undertaker, about the funeral of the deceased, at the request of the defendant, as administrator; and for coaches and horses used in the said funeral. Counts for money paid for the use of the defendant as administrator, and on an account stated with him in that character.

The defendant pleaded payment into court of 53*l.*, and that the plaintiff had not sustained damages to a greater amount in respect of the cause of action in the declaration mentioned.

At the trial, before *Parke, B.*, at the last *Gloucester* assizes, the following appeared to be the facts of the case. The action was brought to recover 72*l.*, the charges made by the plaintiff, an undertaker, for conducting the funeral of Mrs. *Walrond*, a lady of fortune, the mother of the defendant. Mrs. *Walrond* died at *Lasborough*, in *Gloucestershire*, on the 29th of *October*, 1833, and Sir *Bethell Codrington*, her brother, who lived near her residence, ordered the plaintiff to make preparations for burying the deceased, in the family vault at *Dodington*, which was situate about ten miles from *Lasborough*. The defendant, who was the only child of the deceased, was in *Paris* when his mother died, but, upon receiving intelligence of her decease, from Sir *B. Codrington*, he came to *London*, and, on the 24th of *November*, he wrote the following letter to Lady *Codrington*:—

"We arrived in *London* on *Tuesday* evening, and I found your kind letter and one from my uncle, enclosing a copy of my poor mother's will. I delayed writing until I could with some certainty say when I could leave *London*. I now hope to get away *Monday* or *Tuesday* next, and I will avail myself of your and my uncle's kind invitation to come to *Dodington*. The next day I will ask you or Sir *Bethell* to be so good as to accompany me to *Lasborough*, to break the seals and commence our sad duty. I am much obliged to you and to him for all you have done, which was certainly the best, and all that could be done. Would you or Sir *Bethell* have the kindness to do what I am told must be done, sooner or later, send some one to the house to take a list of all property whatsoever, in and out of doors, which is not sealed up, with a view to its future valuation."

The letters to which this appeared to be an answer were not produced.—Sir *Bethell Codrington* found a testamentary paper, which had been executed by Mrs. *Walrond*, but no executor was appointed. In a codicil, she expressed a wish to be buried in the nearest church-yard, with as little expense as possible, without hearse or carriage, but to be carried by twelve respectable labourers, who should receive not less than one guinea each.

It appeared, that if the directions of the deceased had been carried into effect, the expense of the funeral would not have exceeded the 53*l.* paid into court.

The defendant did not take out administration until *July*, 1836; and the effects were sworn to be under 4000*l.*

It was contended, on behalf of the defendant, that he was not liable to be sued in this action; inasmuch as it was not shewn that he had given any

1. A relative of a deceased lady ordered the plaintiff, an undertaker, to perform a funeral which was suitable to her rank; and her son, many months before he took out administration to the deceased's effects, wrote a letter to the relative who ordered the funeral, in which he expressed his approbation of all that had been done. In an action against the deceased's son, charging him as administrator, for the expenses of the funeral, it was held, that the action was maintainable.

2. A plea of payment into court does not bind the defendant beyond the amount paid into court; and he may dispute the residue of the plaintiff's demand, as if non-assumpsit had been pleaded to it.



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orders to the plaintiff to perform the funeral; and that, at all events, he was not liable beyond the amount paid into court.

The learned judge refused to nonsuit the plaintiff, and told the jury that the defendant would not be liable as administrator, in the absence of any express order, for any thing beyond the expenses of such a funeral as the intestate had directed by her will; and that the question therefore was, whether the defendant had by himself, or by his agent, such agent being authorized at the time, or by subsequent ratification, employed the plaintiff to conduct the funeral upon a larger scale of expense. The jury found a verdict for the plaintiff for 16*l*.

In *Easter* Term, *Maule* obtained a rule *nisi*, to set aside the verdict, and to enter a nonsuit, in pursuance of leave reserved, or for a new trial, upon the ground that the credit had not been originally given to the defendant, and that, at all events, he was not liable to be sued in his character of administrator. He contended that the decision in *Rogers v. Price* (a) could not be supported.

*Talfourd*, Serjt., and *Lumley*, shewed cause.—If a relative of a party deceased, orders a funeral which is suitable to his degree, the executor or administrator is bound to pay the undertaker, without any express promise to pay, being proved. *Tugwell v. Heyman* (b). *Rogers v. Price* (a). And great inconvenience would result if this doctrine were not supported. Upon a like principle, where a surgeon attended a pauper who had accidentally fractured his leg, it was held that an action of assumpsit would lie against the overseer who had seen the pauper, and did not repudiate the surgeon's attendance. *Lamb v. Bunce* (d). Nor is there any difference between the liability of executors and administrators. Com. Dig. tit. Administration (C. 1.) The express directions given by the deceased would make no difference, because the funeral, in the present case, was not unsuitable to her station and quality; and the defendant, by not pleading non-assumpsit, cannot now object that the funeral was not conducted according to the directions of the deceased, for, by the plea of payment, the contract which is stated in the declaration is admitted. The plea of payment might have been pleaded to a part of the demand, with non-assumpsit as to the charges for carriages and horses. But, at all events, the direction of the learned judge as to the recognition was correct, and the jury were at liberty to find that the defendant ratified the orders which were given to the plaintiff, for the conduct of the funeral. The letter of the 24th *November*, was receivable in evidence, although the letters to which it was an answer were not produced; and it clearly appeared, by the date and other circumstances, that the defendant must have been informed of the particulars relating to the funeral of the deceased.

*Maule*, and *R. V. Richards*, in support of the rule.—It is quite evident that credit was not originally given by the plaintiff to the defendant, because, when the funeral was performed, the defendant had not arrived in *England*, nor had he given any directions as to the burial of the deceased. There is a dif-

(a) 3 Y. & J. 28.  
 (b) 3 Camp. 298.

(d) 4 M. & Sel. 275.

ference between the situation of an executor, and that of an administrator. An executor derives his authority from the will of the deceased; but an administrator derives his authority from the letters of administration, which are granted by the Ecclesiastical Court. Thus it has been held, that the Statute of Limitations does not begin to operate, until from the time that letters of administration are granted. *Murray v. East India Company* (e). It cannot be maintained, as a general proposition, that an administrator is liable to pay for the burial of the intestate, where no express orders are given. As to the payment of money into court, it merely admits the damage and contract, *pro tanto*; but the plaintiff is bound to prove that a larger sum is due. In the present case, the admission is, that the plaintiff is entitled to receive 53*l.*, on some of the causes of action mentioned in the declaration; but he does not admit his liability to pay the charges for the burial at *Dodington*, contrary to the express directions of the deceased. Nor is the plaintiff entitled to recover on the ground, that the defendant ratified the orders given to the plaintiff, because there was no ratification by him after he became administrator; and if the evidence shewed that the defendant was liable at all, it proved a liability in his personal capacity. Nor did the letter which was produced, satisfactorily shew that the defendant had been informed of the circumstances relating to the burial. The letters which are mentioned as having been received by the defendant, were not produced at the trial, because the defendant could not know that a letter written by him to a third party, would be given in evidence. Therefore, on the ground of surprise, there ought to be a new trial.

TINDAL, C. J.—If this case has been properly left to the jury, no rule can be granted on the ground of surprise, as the verdict recovered is under 20*l.* It appears to me, that there was evidence to go to the jury. This is an action for work and labour, by the plaintiff, as an undertaker; and for hearses and carriages provided for a funeral; and the defendant is charged as administrator of the deceased. The defendant, after paying 53*l.* into court, pleads, “that the plaintiff has not sustained damages to a greater amount than the said sum of 53*l.* in respect of the cause of action in the declaration mentioned, and this he is ready to verify, wherefore he prays judgment, if the plaintiff ought further to maintain his action.” I am unable to perceive any difference between the effect of this plea, and that of a payment of money into court, by a rule, according to the old practice, and a plea of non-assumpsit to the residue. Therefore, the defendant is not bound by the admission, beyond the 53*l.* paid into court, and he may dispute any other portion of the plaintiff’s demand just as freely as if no money had been paid. The defendant is sued as administrator, and by the course of the pleadings it is admitted, that he was administrator; and the question is, whether, beyond the 53*l.*, the defendant is liable to the plaintiff in that character? It appears to me, that he is liable, and that the letter of the 24th of *November*, which was in evidence, amounts to a ratification of the order which was given for the burial of the deceased. Two objections have been raised by the defendant’s counsel: first, that it does not appear that, at the time the defendant wrote the letter, he was aware that the funeral had been performed; and, secondly, that as no letters of administra-

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tion had been taken out at that time, there could be no ratification of the order, by the defendant, in his character of administrator. Now, what was the fair inference to be drawn, as to the defendant's having notice of the way in which the funeral had been performed? The letter was written more than three weeks after the death of the deceased, and the defendant could then have had no reason to doubt but that the funeral had taken place. It is almost impossible to read it, without supposing, that the letters, to which it refers, must have given an account of the funeral; and the very circumstance and tone of the letter shews that it was written by a person who was likely to assume the character of administrator; otherwise why should he speak of breaking the seals, and making an inventory of the property? But it is said, that, as the administration was not taken out until three years afterwards, the letter cannot have the effect of making the defendant liable. It is laid down, in 2 Rolle's Abr. 554, tit. Trespass per Relation, that an administrator shall have an action of trespass for a trespass done to the goods of the intestate, after his death, and before administration granted to him. And in *Whitehall v. Squire* (f), it was determined, that if a person consents to the disposition of an intestate's goods, and afterwards takes out administration, he cannot maintain trover for them, because he is bound by his former consent. So in the present case, why should not the defendant be held bound for that which he did before he became administrator(g)? If, therefore, this letter does amount to a ratification, and I think it does, and, as the defendant has admitted his liability as administrator, to the amount of 53*l.*, it appears to me the verdict may stand. It is unnecessary to say any thing on the case of *Rogers v. Price* (h), inasmuch as it does not govern the present decision.

PARK, J.—We need not give an opinion upon the case of *Rogers v. Price*, although I must say it seems to me to be founded on good sense. The defendant, being sued as administrator, cannot, after having paid money into court, say that he is only liable in another character. It cannot be believed, but that the writer of the letter of the 24th of *November* had been informed of the particulars of his mother's funeral; and if he had not intended, at that time, to become the representative of the deceased, he would not have spoken of breaking the seals; or have requested that an inventory of the effects should be made. It has been contended, that there is a distinction between the situation of an executor and an administrator, and I agree to that. But the case of *Whitehall v. Squire* (f) is an authority to shew, that an administrator may be bound by relation, and there are other cases to the same effect, collected by Mr. *Williams*, in his excellent Treatise on the Law of Executors. I am perfectly satisfied with the verdict and agree that this rule must be discharged.

VAUGHAN, J.—I am of the same opinion. This is an application to the discretion of the Court, and the law and justice of the case go hand in hand. The first question is, as to the payment of the money into court. I do not

(f) 1 Salk. 295. 3 Mod. 276.

(g) If an executor *de son tort* takes administration, all acts done by him before, are good by relation. Com. Dig. tit. Administrator, (C. 3.) citing *Kenrick v. Burges*,

Moore's Rep. 126. See also Com. Dig. tit. Administration, (B. 10.) and *Mitchell v. Moorman*, 1 Y. & Jer. 21.

(h) 3 Y. & Jer. 28.

subscribe to the argument by which it has been attempted to draw a distinction between the old and new practice on this subject; and it seems to me that the defendant is entitled to dispute his liability beyond the 53*l*. We need not touch the case of *Rogers v. Price* (k), but the question is, whether the jury have drawn a right conclusion from the facts; and I am clearly of opinion that they have done so.

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COLTMAN, J.—It has been contended that this action is altogether misconceived, and that the defendant ought not to have been sued in his character of administrator. If that were a good objection, the defendant ought to have pleaded non-assumpsit to the whole demand. But the question now arises, on the record as it stands, and it appears to me that the defendant has clearly admitted his liability as administrator to some extent. The form of the plea of payment into court has been adverted to, and I was at first inclined to think that it was only an admission as to one count in the declaration: but the rule in pleading is, that every thing which is not denied is admitted. Here there are three counts in the declaration, and the defendant admits something to be due, and that the defendant is liable as administrator. In *Meager v. Smith* (l) it is said, "With regard to the payment of money into court, there is no doubt but that if such a payment is made on a count alleging a special contract, it operates as an admission of that contract; if on a general *indebitatus* count for work and labour, or the like, on which the plaintiff might recover for one or more distinct contracts, it operates as an admission of a liability to that amount, on some one or more of such contracts." It comes, then, to this question, whether there was a ratification by the defendant of that which had been done; and it appears to me that the jury were warranted in finding a verdict for the plaintiff.

Rule discharged.

(k) 3 Y. & Jer. 28.

(l) 4 B. & Adol. 680.

### JACKSON v. JACOB.

June 7.

**ASSUMPSIT.**—The declaration stated that the defendant agreed to sell fifty Great Western Railway shares, to the plaintiff, at 37*l*. 10*s*. per share, and to deliver them, on a certain day. The plaintiff alleged that he was ready and willing to accept the shares, and that he tendered the price of them to the defendant. *Plea*, that the defendant was not ready and willing to accept the shares, and that he did not tender the price, *modo et formd*; and issue thereon.

At the trial, before *Patteson, J.*, at the last *Liverpool* assizes, the plaintiff called *Batley*, his broker, as a witness, who proved that a contract had been made by him, on the 1st of *December*, 1836, with *Atkinson* and *Townley*, the defendant's brokers, for the purchase of the shares, on the defendant's account. The shares not being delivered in due course, *Batley* wrote to the defendant on the 10th of *January*, informing him that he had purchased the shares for the

defendant, in reply, without objecting that the broker was not his agent, endeavour to make an arrangement for the delivery of the shares. *Held*, that this was sufficient evidence to prove the tender.

2. Whether a tender to a broker is good, *quære*.

In an action for non-delivery of shares, sold by defendant's broker, the defendant pleaded that no tender of the price had been made, and issue was joined thereon. It appeared, that the defendant was informed that a tender of the price had been made to his broker; and

said he would

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plaintiff, and requiring him to deliver them, in pursuance of the contract, immediately, Two days afterwards, *Batley* received the following letter from the defendant:—

"I should have replied to your letter per return, but was unavoidably detained at *Manchester*, and since my arrival here have been engaged with my solicitors respecting a quantity of Westerns, bought by me from a party in *Bristol*, at a low price. With regard to the fifty shares sold to you on my account, by Messrs. *Atkinson* and *Townley*, the reason they have not been delivered, has arisen from the defalcation of the party above alluded to. I do assure you, I am most anxious to fulfil all my engagements, and will do my best to satisfy every one; all I require is a little time to arrange matters, and I think it is not asking too much in requesting, under the circumstances, that such may be granted. At all events the market for Westerns is evidently falling; and if you are compelled to buy them in, I request you will wait a short time, as I think you will get them at lower prices than the present, and any deficiency that may arise I shall endeavour to arrange if time be given."

On the 12th *January*, *Batley* made a tender of the amount of the shares, to *Atkinson* and *Townley*, but they referred him to the defendant, and stated that there had been disputes between them, and they had nothing further to do in the transaction. On the same day, the following letters passed between *Lowndes* and *Robinson*, the plaintiff's attornies, and the defendant:—

"*Jan. 12.*

"Dear Sir,—Since you left, this morning, *W. J. Jackson*, a client of ours, has called upon us relative to a contract he made, through his broker, *Mr. J. Batley*, for the purchase from you of fifty shares in the Great Western Railway at 37l. 10s. *Mr. Jackson*, this day, made a tender of the price to *Mr. Townley*, who referred him to you, and *Mr. Jackson* has requested us to inquire what arrangements you are prepared to make as to these shares. If, as we presume, you are not ready to deliver the shares, *Mr. Jackson*, although he has sold them, will agree to cancel his contract on reasonable terms, and you had therefore better come across, or authorize Messrs. *Atkinson* and *Townley*, to arrange matters with him. Requesting to hear from you, by return of post, we are, &c.  
*Lowndes* and *Robinson*."

From the defendant to Messrs. *Lowndes* and *Robinson*.—

"*Manchester Jan. 13.*

"Gentleman,—In reply to your letter of yesterday, I beg to say, I wrote to *Mr. Batley* on the subject previous to my leaving *Liverpool*. It is my intention to be over on *Monday* next, when I shall endeavour to arrange with you respecting the shares."

A verdict was found for the plaintiff for 420l.

*R. Alexander*, in *Easter Term*, obtained a rule *nisi*, to set aside the verdict, and to enter a nonsuit, on the ground that a tender made to a broker was insufficient; and that if the plaintiff relied upon a waiver of the tender, it ought to have been pleaded as a waiver.

*Cresswell* and *Crompton* shewed cause.—It would have been quite sufficient if the plaintiff had averred in the declaration, that he was ready and willing to

accept the shares, and that part of the plea, which denied that a tender had been made, was superfluous and immaterial. *Rawson v. Johnson* (a). *Pordage v. Cole* (b). *Waterhouse v. Skinner* (c). Therefore no proof of a tender was necessary to support the issue; and, if proof of it were necessary, then a tender made to the defendant's brokers would be good. At all events, the jury might well infer that the defendant was informed that a tender of the money had been made to his brokers, as his agents, and that the letter of the 13th of *January* amounted to a recognition of their authority to receive a tender. That being so, the plaintiff is entitled to retain the verdict.

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*Wilde, Serjt., R. Alexander, and Wightman*, in support of the rule.—The plaintiff was bound to prove a tender, inasmuch as he had alleged in the declaration that a tender was made. A tender made to a broker is not legal, inasmuch as a broker is *functus officii*, the moment the sale is made. *Blackburn v. Scholes* (d). When the tender was made, the brokers referred *Batley* to the defendant, saying, that they had nothing to do with the matter; and there are many authorities which shew that a tender made to a person who disclaims an authority to receive it, is insufficient. *Bingham v. Allport* (e). *Wilmut v. Smith* (f).

TINDAL, C. J.—This question arises, after a verdict found for the plaintiff, upon an issue raised on a plea, which alleges that the plaintiff was not ready to accept certain shares, and that he had not tendered the price of them to the defendant. It is quite unnecessary to decide whether a tender of the price made to a broker, who has sold shares for his principal, is sufficient. I determine this case upon the ground, that the correspondence shews that a good tender was made. It is quite clear that the defendant had no shares to deliver, and, therefore, the offer of the money was a mere matter of form. I do not urge this as amounting to a dispensation of a tender, but when we find a correspondence which leaves the matter somewhat equivocal, we do no violence to it by holding that it appears that the tender was admitted to have been made. The letter of the 12th of *January* states, that a tender of the money had been made to the defendant's brokers, and the defendant, with a knowledge of this fact, says, in his reply, that he intends to come to *Liverpool*, to endeavour to make an arrangement respecting the shares. This, therefore, is an admission, first, that the contract was made; and, secondly, it is a ratification of the tender. So, by analogy, when the drawer of a bill promises payment to a holder, he thereby admits that the necessary steps have been taken to render him liable. The rule must be discharged.

PARK, J.—I am of the same opinion. It is not necessary to decide whether a tender made to a broker is good. I rely upon the particular circumstances of the case, and it is impossible for any one, with common sense, to read the defendant's letters, without seeing that he knew that the tender had been made to *Townley*, and that *Townley* had refused to receive the money. Yet, on the very next day, the defendant, without repudiating the supposition that *Townley* is his agent, informs the plaintiff's attorneys, that he will endeavour to make

(a) 1 East, 203.

(b) 1 Wm. Saund. 319 b.

(c) 2 Bos. & P. 447.

(d) 3 Campb. 343.

(e) 1 Nev. & M. 398.

(f) 3 Car. & P. 454.

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some arrangement respecting the shares. In fact, the defendant altogether acquiesces, and admits that the tender was a good one.

VAUGHAN, J.—The jury were asked, whether there was not evidence of a good tender, and, upon looking at the letter, it is impossible not to see that there was a recognition, by the defendant, of *Townley's* authority to receive a tender. If it were otherwise, the defendant would have disclaimed the agency of *Townley*, but, instead of doing so, he promised to make some arrangement.

COLTMAN, J.—I am of the same opinion. The question is, what the understanding between these parties was? and whether the plaintiff was not entitled to act upon the belief that the broker had authority to receive the tender? The defendant, by his letter, admitted that the agent had such an authority, because he promised to make some arrangement with the plaintiff; and he cannot now turn round and defeat the justice of the case, by saying, that the agent had no such authority.

Rule discharged.

### In the Matter of RIDER and another.

June 9.

A bond of submission recited that certain disputes, relating to building a house, had been agreed to be referred to arbitration, and that the arbitrators should determine all claims relating to alleged defects and imperfections in the materials and workmanship, and likewise relating to the accuracy of the claims for extra work and deductions for omissions; and to ascertain what balance, if any, was due to the builder, in respect of such extras and omissions; the costs to abide the event of the award. The arbitrator awarded that 296*l.* should be paid to the builder in full compensation and satisfaction for all the matters in difference. *Held*, that the award was bad, as the two first subjects of dispute were not determined.

A RULE *nisi* had been obtained to set aside an award, upon the ground that the arbitrator had not determined the matters referred to him. It appeared, by the affidavit of Mr. *Fisher*, that Messrs. *Riders*, builders, had entered into a contract with him, to build a house and offices at *Bentworth*, and that disputes having arisen between them respecting the sufficiency of the materials, and the goodness of the workmanship, it was agreed to refer the matter to arbitration.

The bond of arbitration recited, that Messrs. *Rider* had entered into the contract to build the house, and that disputes had arisen respecting alleged defects and imperfections, and that the said *Riders* had made claims for extra works, and deductions in regard to omissions, but of which no detailed accounts had been furnished to *Fisher*; and that it had been agreed between the parties, that, for the purpose of settling, judging, and determining, of all such alleged defects and imperfections, and what, if any thing, was necessary to be done to put the said house and outbuildings in a perfect condition, in conformity with the original drawings and specification, and according to the intent and meaning of the said contract, and for ending all differences and disputes, that it should be referred to certain arbitrators, to whose arbitrament and final determination the parties had severally and respectively agreed to submit all such claims, differences, and disputes between them, and the accuracy of such claims and deductions, and that their award should be final and conclusive both at law and in equity. It was also agreed that the costs incident to the reference should abide the result of the award.

The arbitrators, by their award, directed that *Fisher* should "forthwith well and truly pay unto the said *Riders* the full sum of 296*l.*; and that the same should

be paid to the builder in full compensation and satisfaction for all the matters in difference. *Held*, that the award was bad, as the two first subjects of dispute were not determined.

be received by them in full satisfaction and compensation of and for all the matters in difference between them, and so referred to them the said arbitrators."

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*Taddy*, Serjt., and *C. Saunders*, shewed cause.—The finding of the arbitrators does in effect determine all the matters in difference between the parties; and if *Fisher* is entitled to deductions on account of any imperfections, it must be taken that the balance was struck after allowing for such imperfections. *Cargey v. Aitcheson* (a), *Dicas v. Jay* (b). [Tindal, C. J.—The omission to mention defects, if any existed, would affect the question of costs, and probably the greatest expense was incurred in investigating that portion of the case.] If the parties had wished for a specific decision, with a view to costs, an application ought to have been made to the arbitrators. *Dibben v. The Marquis of Anglesey* (c).

*Wilde*, Serjt., *contrà*.—The submission gave no power to the arbitrators to set off damages sustained by defects, in liquidation of the general balance. As the award now stands the question of costs remains undetermined.

TINDAL, C. J.—I am of opinion that the submission, which prescribes what the arbitrators are to do, has not been observed. They are required, first, to determine all disputes "relative to alleged defects and imperfections," that is one substantive matter; secondly, "concerning disputes relating to the accuracy of claims for extra work, and deductions for omissions;" and, thirdly, "to ascertain what balance might be due in respect of such extras and omissions." But the balance which has been found by the arbitrators, seems to be confined to the third head of inquiry, and the two first are neglected altogether, so that it is uncertain whether or not they have found a general balance. The rule must, therefore, be made absolute.

PAEK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule absolute.

(a) 3 Dow. & R. 433.

(b) 10 Bing. 570.

(c) 5 Bing. 281.

### BROGREFFE v. HAWKE.

June 12.

A RULE *nisi* had been obtained, calling upon the defendant to shew cause why the taxation of costs in this cause should not be reviewed. The action was brought to recover 119*l.*, alleged to be due on a building contract, and the defendant pleaded, first, non-assumpsit; secondly, payment; and, thirdly, a set-off.

After the cause was set down for trial, it was referred to arbitration, on the recommendation of the learned judge, and a nominal verdict was taken for 300*l.*, the damages stated in the declaration. The arbitrator, after examining upwards of twenty witnesses, directed by his award, that a verdict should be entered for the defendant on the second issue, and for the plaintiff on the first and third issues, with 8*l.* 5*s.* 8*d.* damages; and that each party should pay

A judge has power, under the Rule of Hilary Vacation, 1834, to certify that a cause was proper to be tried before him, and not before the judge of an inferior court, where the action is referred, at *nisi prius*, to arbitration.



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his own costs. An application was made to *Tindal*, C. J., in pursuance of the Rule of *Hilary* Vacation, 1834, to certify, on the *postea*, that the cause was proper to be tried before him, and not before a judge of an inferior court, but no certificate having been given, the costs were taxed on the reduced scale.

*Ellis* shewed cause, and contended that the Rule of Court did not enable the judge to certify, unless the cause had been actually tried before him; and that, if the parties had intended to reserve a power of granting a certificate, it was necessary to provide for it specially in the order of reference, as in cases where arbitrators are authorized to certify that the costs of a special jury ought to be allowed (a).

*Wilde*, Serjt., *contrd.*, insisted that the case was a proper one for the decision of the superior court, and that the intention of the rule was, that the judge should have a power to certify, when a verdict was taken subject to an award; and that the point had been so determined in *Nokes v. Fraser* (b). He cited *Ivey v. Young* (c), to shew that the certificate may given at any time.

TINDAL, C. J.—*Nokes v. Fraser* (b) is certainly in point; and as it seems to me that I had the power to certify, I shall do so. The rule must be made absolute.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule absolute.

(a) See *The King v. Moate*, 3 B. & Adol.  
 237.

(b) 3 Dow. P. C. 339.  
 (c) 5 Dow. P. C. 450.

June 8 & 9.

## BIRD v. GAMMON.

1. Where B. had issued execution against the goods of A. his debtor, C. came forward and agreed to pay B. and all the other creditors of A., upon having an assignment of his effects; and, in pursuance of this agreement, A. gave a bill of sale of his effects to C., and B. withdrew his execution. *Held*, that this raised a new contract between B. and C., and that the former might sue the latter, for the amount of the debt originally due from A.

2. Where a debtor wrote a letter to a creditor respecting a debt for which he was liable, stating, that he was very wretched indeed on account of his account not being paid, and that he heard that there was a prospect of an abundant harvest, which must very considerably reduce the account, and that if it did not, the concern must be broken up to meet it at last. *Held*, that this was a sufficient acknowledgment to take the case out of the Statute of Limitations, (9 Geo. 4, c. 14;) also that the construction of the letter was properly left to the jury, and that parol evidence was admissible to shew the amount of the debt.

ASSUMPSIT for work and labour, money had and received, and on an account stated. *Pleas*—non assumpsit; and as to a part of the demand, the Statute of Limitations; and as to another part, payment into court. At the trial, before *Parke*, B., at the last *Worcester* assizes, the following appeared to be the facts of the case:—

The plaintiff sued the defendant to recover certain sums of money amounting to 1000*l.* and upwards, the balance of an account. As to 340*l.* 6*s.* 10*d.* part of the demand, the following evidence was given. In 1829, the plaintiff, who was an attorney, obtained a warrant of attorney, from one *Lloyd* a farmer, for the sum of 340*l.* 6*s.* 10*d.*; and, *Lloyd* being in embarrassed circumstances, the plaintiff signed judgment on the warrant of attorney, and *Lloyd's* goods

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were taken in execution. The defendant, who was brother-in-law to *Lloyd*, then came forward, together with one *Acton*, since deceased, with a view to make some arrangements for the settlement of *Lloyd's* affairs; the defendant and *Acton* being themselves creditors to a considerable amount. An offer of 10s. in the pound was first made to the creditors, which they refused to accept; whereupon the defendant and *Acton*, having examined the state of *Lloyd's* accounts, at length proposed to pay the debts in full, upon condition that all his effects were conveyed to them. The plaintiff and the other creditors assented to this proposal, and the plaintiff withdrew the execution; and, on the 15th of *May*, 1829, a bill of sale was prepared, which recited that *Lloyd* was in embarrassed circumstances, and that the defendant and *Acton*, as his friends, had come forward to pay his debts, or to secure them to be paid; and that, for the purpose of indemnifying themselves, they had taken the said bill of sale. The consideration for this assignment was stated to be the undertaking of *Acton* and the defendant to pay the debts, which amounted to upwards of 3000*l*. The bill of sale was attested by the plaintiff. An account was also proved, signed by the plaintiff and the defendant and also by *Lloyd*, by which it appeared, that, at this time, 340*l*. 6*s*. 10*d*. was due from *Lloyd* to the plaintiff, and evidence was given to shew that the effects which passed by the bill of sale were sufficient, or nearly sufficient, to pay all the creditors 20*s*. in the pound.

After this arrangement had been made, *Lloyd* remained in the occupation of his farm, as bailiff, and the defendant and *Acton* made payments on account of the debts due to *Lloyd's* creditors, and incurred other debts, and amongst others a further debt to the plaintiff. Another account was proved, bearing date in *May*, 1832, which contained a statement of the debts then due in respect of *Lloyd's* business; and in that account the plaintiff's claim was set down as 767*l*. 14*s*. 11*d*. which sum included the 340*l*. 6*s*. 10*d*.: this account was cast up by the defendant in his own figures, and *Lloyd*, who was called as a witness, proved that the defendant said that he owed all that money to the plaintiff.

For the purpose of taking the case out of the Statute of Limitations, the following letter, written by the defendant to the plaintiff, on the 4th *August*, 1832, was put in evidence.

"I am in receipt this day only, of your's of the 22d inst. I do wish I could comply with your request; for really I am and have been very wretched indeed on account of your account not being paid. I hear there is a prospect of an abundant harvest, which surely must turn into a goodly sum, and very considerably reduce your account; at all events, if it does not, the concern must be broken up to meet it at last. I have this week paid *Lechmere* and Co. very near 500*l*. on account of *Lloyd*, not a farthing of which I ever expect again, having before paid, on the same account, more than the value of the security I hold. It is really a calamity to be so connected. It is impossible any one can be more sensible than I am of your kindness towards *Lloyd's* family, and my hope is that out of the present harvest you will be paid."

It was objected, on the part of the defendant, first, that the plaintiff was not entitled to recover, inasmuch as a chose in action could not be assigned, and that the Statute of Frauds required an undertaking to pay the debt of another to be in writing; secondly, that, as to the 340*l*. 6*s*. 10*d*., the Statute of Limitations was a bar to the action, and that the letter of the 4th of *August* did not amount to an acknowledgment or promise to pay the debt within 9 Geo. 4, c. 14, and, if it did, then that parol evidence to shew the amount of

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the debt was inadmissible. The learned judge directed the jury as to the first objection, that if they were satisfied that *Lloyd* was discharged, and that the defendant became the plaintiff's debtor, the action was maintainable; as to the other objection, he directed the jury that the letter was sufficient to take the case out of the operation of the Statute of Limitations, and that, if they were also of that opinion, the objection could not be supported. The jury found a verdict for 488*l.* 12*s.* 7*d.*, which included the 340*l.* 6*s.* 10*d.*

*Maule*, in *Easter* Term, obtained a rule *nisi*, upon the objections taken at the trial, to set aside the verdict, and enter a nonsuit; or for a new trial, or to reduce the damages by the sum of 340*l.* 6*s.* 10*d.*; he also contended, that the effect of the letter of the 4th *August* was a question for the judge, and not for the jury.

*Wilde*, Serjt., *Ludlow*, Serjt. and *Godson*, shewed cause.—First, this case may be determined without reference to the Statute of Limitations. When the accounts were balanced between the parties, in *May*, 1832, there was evidence that the defendant then acknowledged that he owed the balance, which was stated, to the plaintiff; and this action was commenced before the expiration of six years from that period. Thus, in *Smith v. Forty (a)*, an administratrix sued for a debt due to the intestate; and it appeared that the debt accrued more than six years before the commencement of the action, but that, within six years, the defendant and the agent of the administratrix went through the account together, and struck a balance, which the defendant promised to pay as soon as he could; and it was held, that the administratrix was entitled to recover on a count upon an account stated with her, and that the Statute of Limitations was no bar. But, if it is necessary to shew an acknowledgment or promise, then the letter sent by the defendant to the plaintiff, contained an acknowledgment of the debt sufficient to warrant the jury in finding a verdict for the plaintiff. The cases upon this point are much stronger than the present. *Dodson v. Mackey (b)*, *Frost v. Bengough (c)*, *Bryan v. Horseman (d)*, *Beale v. Nind (e)*, *Dabbs v. Humphrey (f)*, *Lechmere v. Fletcher (g)*. *Whippy v. Hillary (h)* is distinguishable from the present case, because there the defendant referred to another person, by whom the defendant was to be paid; and the statute 9 Geo. 4, c. 14, requires the promise to be made by the party "chargeable thereby." But the defendant refers in his letter to a debt which he was himself liable to pay, and the promise is unconditional. It is true that he refers to the proceeds of the harvest, as the fund out of which he hopes to satisfy the demand; but he proceeds to say, that if it does not reduce the account, "the concern must be broken up to meet it at last." *Linsell v. Bonsor (i)* is also distinguishable, because the defendant acknowledged the debt, but added that he was determined not to pay it. The question on the Statute of Frauds does not arise; for here there was an agreement between the plaintiff, *Lloyd*, and the defendant, that the latter shall become the debtor, and the jury have found

(a) 4 Car. & P. 126.

(b) 4 Nev. & Man. 327.

(c) 8 Moore, 180.

(d) 4 East, 599.

(e) 4 B. & Ald. 568.

(f) 4 M. & Scott, 285.

(g) 1 Cr. & M. 623.

(h) 3 B. & Adol. 399.

(i) 2 Bing. N. C. 241. S. C. 1 Hodges.  
 305.

that *Lloyd* was released. The case is, therefore, within the principle of *Good v. Cheeseman* (k).

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*Talfourd Serjt., and R. V. Richards, contra.*—The plaintiff is not entitled to recover by reason of the balance having been struck between the parties in 1832. *Smith v. Forty* (l) is the only authority in support of that proposition, but if that case should be supported, the provisions of the Statute of Limitations will be altogether nugatory. It is impossible that a bare parol acknowledgment of a debt, can give rise to a new cause of action. The object of the Statute of Limitations was, to prevent parties from proving the existence of a debt by parol evidence. In *Willis v. Newham* (m), *Garrow, B.*, observes, "In the course of the argument, the case of an account current was put, in which the party charges himself, and takes credit for payments made by him; and it was said, shall not this be evidence to take the case out of the Statute of Limitations? I answer, no; because the act says, the defendant shall not be charged except by an acknowledgment in writing signed by him. It must be a writing with the solemnity of a signature, and nothing short of that can bind the party." In *Hyde v. Johnson* (n) it was decided that an acknowledgment signed by the agent of a debtor was insufficient, because it would lead to the admission of parol evidence to prove the agency. Secondly; the letter does not contain an acknowledgment or promise to pay the debt. In *Kennett v. Milbank* (o), it is said, "an acknowledgment can operate as evidence of a promise: and if it be accompanied with qualifications which shew it was not meant to operate as a promise, it will not be sufficient to take a debt out of the operation of the Statute of Limitations." The defendant points to the proceeds of the harvest, as the fund which is to furnish the means of payment, but he does not promise to pay the debt, at all events. That case is also an authority to shew that the acknowledgment ought to state the amount of the money due. *Lechmere v. Fletcher* (p).

*TINDAL, C. J.*—There are two questions in this case: one on the Statute of Limitations, which is set up as a bar to the whole demand; another, on the Statute of Frauds, which applies to a portion of it. With respect to the Statute of Limitations, the objection is, that the cause of action had accrued more than six years, and the question is, whether there has been any acknowledgment, or promise in writing, within 9 Geo. 4, c. 14, sec. 1. That depends upon the letter of the 4th of *August*, 1832, and that letter appears to me to amount to a promise to pay an existing demand; and, although it points at one particular mode of payment, it does not seem to me to be confined to that mode, but merely contains an expression of the ground of a hope, that the payment would be no longer deferred. After expressing an expectation that the proceeds of the harvest would reduce the account, the writer adds—"if it does not, the concern must be broken up to meet it at last," which seems to imply, that the debt must be paid by a sale of the property which was then in the defendant's hands.

Then it is objected, that the construction of this letter ought not to have been left to the jury; but it is well established by a chain of cases, from *Lloyd*

(k) 2 B. & Adol. 328.

(l) 4 Car. & P. 126.

(m) 3 Young & J. 533.

(n) 2 Bing. N. C. 776. S. C. 2 Hodges, 94.

(o) 8 Bing. 42.

(p) 1 Cr. & M. 623.

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*v. Maund* (a) to *Frost v. Bengough* (b), that the proper course was adopted; and, even if this were not so, the objection would be of little force, because the learned judge was of opinion that the letter was sufficient, and in that opinion I entirely agree. The next point is, whether the acknowledgment is imperfect by reason of its omission to state the amount of the debt, and if this were a new question, I should have entertained some doubt, but, after the decision of *Lechmere v. Fletcher* (c), where the rule is laid down by Mr. Baron Bayley, whose accuracy and learning we so well know; I agree that where an acknowledgment is silent as to the amount of the debt, it may be supplied by parol evidence. All the objections as to the first branch of the case, are therefore answered.

Then comes the second question, namely, whether the verdict for the 34*l.* 6*s.* 10*d.* ought to be retained. It appears that *Bird* was a creditor of *Lloyd*'s to that amount, and he held a warrant of attorney as a security. In consequence of *Lloyd* becoming embarrassed in his circumstances, judgment was signed upon the warrant of attorney, and execution issued against his effects. This being the state of affairs, *Aston* and the defendant, the latter being the brother-in-law of *Lloyd*, came forward, and made an offer to the creditors, of ten shillings in the pound, which the plaintiff and the other creditors refused to accept. The accounts of *Lloyd* are then examined by the defendant, and it appeared that a large sum was due to the creditors, and, amongst others, they ascertained the amount of the plaintiff's debt. An account is then made out, which is signed by *Lloyd* and the defendant, and is witnessed by the plaintiff, and thus all the parties are cognizant of the transaction. On the 15th of *May*, a bill of sale is executed by *Lloyd*, of all his effects, to *Aston* and the defendant: it is not drawn in the ordinary form, as an assignment to trustees, but they are to hold the effects absolutely, to their own use, and they undertake to pay the creditors. Matters go on upon this arrangement for some years, *Lloyd* remains in possession of the effects, and he overlooks the farm; and, in *May*, 1832, an account is stated, which becomes a most material document, as shewing the footing upon which the parties then stood. The very first item in this account, is 34*l.* 6*s.* 10*d.*, set down with other sums as due to the plaintiff, and the sum total is written by the defendant, and he afterwards is heard to say—"these are the sums we owe to *Bird*." So that here is an admission, by the defendant, that he was the immediate debtor to the plaintiff, made after the plaintiff had relinquished all his claims upon *Lloyd*, and after the defendant had taken possession of all *Lloyd*'s effects upon an agreement to pay his creditors. No objections can be maintained on the effect of the Statute of Frauds, because as between the plaintiff and defendant, this was not a promise to pay the debt of a third person; but it was a new contract, that if the plaintiff would forego the benefit of his execution, the defendant would pay him his debt. Upon this point the case is within the principle of *Read v. Nash* (d).

But it is said, that the plaintiff could recover against *Lloyd*, and if that were so, it would be a strong argument in favour of the defendant; but I do not see why *Lloyd* could not, by plea or *audita querela*, shew that, upon good consideration, the plaintiff gave up his remedy as against him, and accepted the

(a) 2 T. R. 760.  
 (b) 1 Bing. 366.

(c) 1 Cr. & M. 623.  
 (d) 1 Wils. 305.

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defendant as his debtor; and although this plea would not properly be accord and satisfaction, the case of *Good v. Cheeseman* (e), and the authorities which are there cited, shew that such a plea would be a good answer to the action. The rule must, therefore, be discharged.

PARK, J.—I am of the same opinion. The question on the Statute of Limitations has been fully answered by the cases: *Whippy v. Hillary* (f) is very distinguishable. As to the objection that the amount of the debt is not stated, it is now fully determined that parol evidence may be received. It may be said that *Kennett v. Millbank* (g) is overruled, although Mr. Baron Bayley, in giving judgment in *Lechmere v. Fletcher* (h), distinguishes that case. As to the other point, it appears, by the evidence, that upon a good consideration, *Lloyd* assigned his effects to the defendant, and that all parties were present and acquiesced in the arrangement. *Good v. Cheeseman* (e) is decisive upon this part of the case.

VAUGHAN, J.—I am of the same opinion. As to the question arising out of the absence of any mention of the amount of the debt in the defendant's letter, without pretending to reconcile all the cases, I am disposed to act upon the decision in *Lechmere v. Fletcher* (h). As to the other point, all the facts conspire to shew that the defendant became an original debtor to the plaintiff, and that *Lloyd* was altogether released, and *Good v. Cheeseman* (e) is quite in point. What a situation would not *Lloyd* have been in, if, after giving up all his effects, he still remained liable to the plaintiff and the other creditors?

COLTMAN, J.—As to the 340*l.* 6*s.* 10*d.* no difficulty arises. If a debtor, creditor, and a third person, agree, upon good consideration, that the third person shall become the debtor, the other is discharged: *Fairlie v. Denton* (k) points out the exception to the general rule, that choses in action cannot be assigned; and *Good v. Cheeseman* (e) shews, that a good answer could be set up by plea. In the present case an *auditd quereld* would seem to be applicable. In Com. Dig., tit. *Auditd quereld*, it is said to lie "for a man in execution, or in danger of it, upon a judgment, statute merchant, staple, or recognizance, when he has matter in fact, or in writing, to avoid such execution, and no other means to take advantage of it." On the other point, it seems to me, that the effect of the letter was properly left to the jury, and that they were warranted in finding that it contained an express promise to pay the debt.

Rule discharged.

(e) 2 B. & Ado. 329.

(f) 3 B. & Ado. 399.

(g) 8 Bing. 37.

(h) 1 Cr. & M. 623.

(k) 8 B. & Cress. 395.

June 21.

## CROFT v. MILLER.

The rule of Hilary Vacation, 1834, as to the taxation of costs on the reduced scale does not apply to actions brought for unliquidated damages, where less than 20*l.* is awarded on a writ of inquiry.

**MOTION** to review the prothonotary's taxation of costs. The plaintiff sued the defendant on a guarantee to pay certain costs incurred in the Court of Chancery. The defendant suffered judgment to go by default, and upon a writ of inquiry the damages were assessed at less than 20*l.*, whereupon the prothonotary taxed the plaintiff's costs upon the reduced scale promulgated by the Court in Hilary Vacation, 1834.

*Bompas*, Serjt., shewed cause.—*Hoppell v. Leigh* (a) is an express authority to shew that the taxation was correct; and in *Savage v. Lipscombe* (b), the Court construed the rule liberally, and refused to allow the plaintiff his usual costs where his demand had been reduced below 20*l.* by a cross demand.

*Wilde*, Serjt., in support of the rule.—An action for unliquidated damages cannot be tried before the sheriff, upon a writ of trial pursuant to 3 & 4 W. 4, c. 42, s. 17: and the rule of Hilary Vacation, 1834, was framed with reference to the provisions of that statute. It appears by the form of the heading which is given for bills of costs, that the rule is only applicable to actions for debts. That was not commented upon in *Hoppell v. Leigh* (a).

TYNDAL, C. J.—I am disposed to doubt whether *Hoppell v. Leigh* (a), ought to be supported; but as this is a case of importance we will consult the judges of the other courts before we dispose of this rule.

The Court afterwards made the rule absolute.

Rule absolute.

(a) 5 Dow. P. C. 40. S. C. 2 Hodges, 107.

(b) 5 Dow. P. C. 385.

June 12.

## KIRWIN v. JONES and others.

In an action of trespass, where the *locus in quo* was of considerable extent and related to a right to moor ships, the plaintiff was required to give particulars of the trespass.

**WIGHTMAN** had obtained a rule *nisi* requiring the plaintiff to give a more particular statement of the trespasses which were complained of in an action of trespass. The declaration stated that the defendants "broke and entered a close of the plaintiff called *Cross Fettes* and *Marsh*, otherwise called *The Marsh*, otherwise called *The Harbour*, otherwise called *The South Side of the Harbour*, otherwise called *The South Side of the Harbour of Warlington*, and in a certain part of the said close, to wit, a part called the *Glebe Quay*, then moored divers ships, and in and upon the said close, then cast and threw divers chains to certain posts of the plaintiffs, &c."

When the rule was obtained it was stated that the question in dispute, was whether the defendants had a right to moor ships in the *Harbour of Warlington*, but that as the *Marsh*, and the other places mentioned in the declaration were

some miles in extent, it was difficult to draw the pleas of justification so as to cover all the trespasses intended to be justified.

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*Barstow*, shewed cause.—It is not usual to require particulars in actions of trespass, and this case has already been before Mr. J. *Littledale* at chambers who refused to make any order, but referred the matter to this Court.

*Wightman*, *contrd.*—Unless the plaintiff will give some more specific statement of that which he complains of, as being a trespass, it is impossible that the defendants can plead a justification to the action. Ships are moored at various places in the harbour, and in some of these places the defendants contend they have a right to moor them.

TINDAL, C. J.—It certainly is not usual to give particulars in actions of trespass, but it is very possible to conceive that they are very necessary in some cases. I think the plaintiff should give a statement of these trespasses to the defendant; he might say that he complained that the ships were moored on such a day, at such a place. If the defendants are not satisfied with the particulars delivered, a further application may then be made to a judge at chambers.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule absolute(a).

(a) See also *The King v. Curwood*, 1 Har. & Wol. 310.

# FOSTER v. STEELE.

May 27.

ACTION on a policy of insurance from *Sierra Leone* to *London*. The cause had been tried before a special jury in the city of *London*, and the question was whether the ship was sea-worthy when she sailed from *Sierra Leone* on her homeward voyage. It appeared that she had experienced heavy gales of wind after leaving *Sierra Leone*, and sprung a leak before she reached *Madeira*: that some repairs were done at *Madeira*; but soon after she had left that place she experienced a storm, and was abandoned by the crew with nine feet of water in her hold. On the part of the defendant it was shewn that the crew were in a very sickly state when the vessel left *Sierra Leone*; and that it was from being insufficiently manned, and not from stress of weather, that the loss happened. It appeared that the crew were unhealthy before the vessel sailed from *Sierra Leone*.

The jury found a verdict for the plaintiff upon this evidence, and a new trial was subsequently obtained, upon the ground that the verdict was against the evidence.

The cause went down for trial a second time, before *Tindal*, C. J., and another special jury, who, upon precisely similar evidence to that which had been adduced upon the first trial, found a second verdict for the plaintiff.

*Wilde*, Serjt., obtained a rule *nisi* for a third trial, upon the ground that the verdict was against evidence.

Upon a question of seaworthiness in an action on a policy, the jury found a verdict for the plaintiff, and a new trial was obtained upon the ground, that the verdict was against the evidence. Upon the second trial, the verdict was again found for the plaintiff upon the same evidence. *Held*, per *Tindal*, C. J., and *Park*, J., that no further trial ought to be allowed, the verdict not being perverse. *Vaughan*, J., and *Coltman*, J., *dis.*



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*Taddy*, Serjt., and *Channell*, shewed cause, and contended, that sea-worthiness was a question of fact for the jury. The following cases were cited, *Swinnerton v. Marquess of Stafford* (a), *Hucks v. Thornton* (b), *Forbes v. Wilson* (c).

*Wilde*, Serjt., and *Amos*, in support of the rule, contended that the onus of proving that a ship was sea-worthy, rested upon the assured, and that a vessel must be made sea-worthy with reference to the perils she was likely to encounter; also that the same reasons which induced the Court to grant a new trial in the first instance, remained in full operation. *Annen v. Woodman* (d), *Douglas v. Scougall* (e), *Watson v. Clark* (f), *Levy v. Milne* (g), *Parker v. Potts* (h), *Goodwin v. Gibbons* (i).

TINDAL, C. J.—My mind has fluctuated during the progress of the argument, but unless this second verdict has been most manifestly perverse I feel a difficulty in sending down the case again, because the whole question was a matter of evidence peculiarly for the consideration of a jury. If the verdict should be returned a third, or even a fourth, time in favour of the plaintiff, then upon an application for a new trial the very same argument may be urged again with equal force, and it seems to me that we should be invading the province of the jury, if we made this rule absolute. Precisely the same evidence was given upon the second trial as on the first, and twenty-four merchants of the city of *London*, have, therefore, now decided a question which was peculiarly within their knowledge. If the matter had depended upon my own individual opinion, I do not say that as a jurymen, I should have concurred in the verdict, but for the reasons I have already given I am of opinion that this rule ought to be discharged.

PARK, J.—I by no means say that it is not competent for this Court to send a cause to be tried a third, or even a fourth time, but it is only in the case of a perverse verdict that we ought to interfere a second time. This case has been decided twice, upon the same evidence, by two special juries, and the evidence was fully left to them; and although I might have doubted before I concurred in the verdict, I agree that this rule ought to be discharged.

VAUGHAN, J.—I feel a difficulty in saying that this cause ought not to be tried again. No doubt can exist as to the power of the Court to send a cause down for a third trial, and I remember several instances myself when a third trial has been granted after two verdicts the same way. The only question is whether this is a case in which the Court will exercise its authority. It appears that the same evidence was given at both trials; therefore, as the Court thought after the first trial, that the verdict was wrong, the same reasons ought to operate now; and if, as it has been suggested, a third verdict should confirm the others, we must deal with that case when it is brought before us. It seems to me that gross and palpable injustice will happen if this

(a) 3 Taunt. 91.  
 (b) Holt, N. P. C. 50.  
 (c) 1 Park. on Ins. 344.  
 (d) 3 Taunt. 299.  
 (e) 4 Dow. 269.

(f) 1 Dow. 336.  
 (g) 4 Bing. 195.  
 (h) 3 Dow. 26.  
 (i) 4 Burr. 2108.

rule is not made absolute. What is the meaning of a perverse verdict, unless it mean, a verdict against the justice of the case?

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COLTMAN, J.—It is clear that justice has not been done in this case. There does not seem any difference of opinion on the bench, as to what the verdict ought to have been. The power of the Court to send a cause down a third time is admitted. I should always be unwilling to exercise such a power where the decision has turned upon a mere question of fact; nevertheless, I feel strong jealousy with respect to verdicts upon the subject of sea-worthiness, inasmuch as juries are apt to divide amongst many, a loss which would otherwise fall very heavy upon one person. This was not an insurance upon a voyage out and home, and probably the jury have not sufficiently adverted to the state of the ship at the time when the policy attached, and it is upon this ground that I should have been better satisfied if the cause had gone down for a new trial.

Rule discharged.

### FOSTER v. ALVEZ.

June 12.

THE defendant was one of the underwriters on the policy of insurance mentioned in the last case, who, with four others, had also been sued by the plaintiff, whereupon he and the other underwriters made the usual application to the Court, and a consolidation rule had been granted.

The Court refused to open a consolidation rule, where the cause by which the other defendants were bound, had been tried twice upon its merits, and a third trial had been refused, although the verdict for the plaintiff was not altogether satisfactory.  
 Vaughan, J., diss.

Wilde, Serjt., upon failing to obtain a new trial in the cause of *Foster v. Steele*, obtained a rule *nisi*, calling upon the plaintiff to shew cause why the consolidation rule should not be opened, and why the defendant in this action should not be permitted to proceed to trial. He cited *Cohen v. Bulkeley (a)*.

Taddy, Serjt., shewed cause, and contended that the consolidation rule was never opened, when the cause which had been tried, was decided upon its merits.

Wilde, *contra*, submitted that the parties who entered into the consolidation rule, originally agreed to be bound by such a verdict as should be satisfactory to the Court; and, that, in the present instance, none of the judges had been satisfied with the decision, whilst two of them had expressed their disapprobation of it.

TINDAL, C. J.—I am unable to see any sufficient distinction between this application, and the application to grant a new trial, which has already been determined. It would lead to great difficulties to make this rule absolute; and if a verdict should be given for the defendant, then all the other defendants would apply to the Court, and the consolidation rule would become altogether useless. This is not like a case where there has been a defect or failure of justice, or where new evidence would be produced; therefore, whatever my private opinion may be, as to the propriety of the verdict, I am not disposed to break into a general rule of so much importance.

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PARK, J.—In all my experience, I never heard of a consolidation rule being opened after a second verdict. The question was purely a mercantile one, and it was decided by two special juries of merchants; but I need not say whether I am satisfied or dissatisfied with the verdict. I agree that a distinction may be drawn, if the merits of the case had not been brought before the jury; but after two verdicts upon the merits, and after the Court has refused to grant a new trial, the consolidation rule would be rendered altogether nugatory, if such an application as the present was granted.

VAUGHAN, J.—I regret that I cannot agree with the rest of the Court. I cannot but consider this as an application to the sound discretion of the Court, and though with respect to the other cause it is important *ut sit finis litium*, yet here another person steps forward and urges, that he has only consented to be bound by such a verdict as is satisfactory to the Court. The other verdict is not satisfactory, and, therefore, I would open the consolidation rule.

COLTMAN, J.—This is, in effect, another application to send the former cause to a third trial; and I do not think I shall be open to a charge of inconsistency, if I agree that this rule ought to be discharged, because I always object to do that by an indirect course, which cannot be effected in the regular course.

Rule discharged.

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#### TRINITY TERM, 7TH WM. IV.

IT IS ORDERED that, from and after the last day of this present *Trinity* Term, all the offices (the Secondaries' Office excepted,) be open, in term, from eleven in the forenoon until five in the afternoon, and not in the evening; and that the Secondaries' Office be open, in term, from eleven in the forenoon, until three in the afternoon, and from six o'clock until eight o'clock in the evening: and that, in the vacation, all the offices be open from eleven in the forenoon, until three in the afternoon, except between the 10th day of *August* and the 24th day of *October*, when they are to be open from eleven in the forenoon until two in the afternoon only.

N. C. TINDAL.

J. A. PARK.

J. VAUGHAN.

THOS. COLTMAN.

END OF TRINITY TERM.

# CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term, 1837.

IN CHANCERY.

Between MARGARET STODDART DOUGLAS, (wife of JAMES DOUGLAS STODDART DOUGLAS,) by HENRY LEIGH DOUGLAS MORSON, her next friend, Plaintiff.

And

WILLIAM CONGREVE RALPH DUNN, the said JAMES DOUGLAS STODDART DOUGLAS, the Rev. ALEXANDER HOUSTOUN DOUGLAS, ELIZABETH HOUSTOUN, ARETAS AKERS the elder, ARETAS AKERS the younger, and STEPHEN MONCKTON, and JOHN MORRISON, defendants.

THE following case was submitted for the opinion of this Court, by an order made by the Right Honourable the Master of the Rolls, bearing date the 4th August, 1836.

*George Douglas*, late of *Chilston Park*, in the county of *Kent*, Esq., was seized, in fee simple, of the manors of *Chilston*, *Bowley*, and *Lenham*, the mansion house and Park called *Chilston Park*, and divers farms and tenements, situated in the county of *Kent*. And the said *George Douglas* was also possessed of a very considerable personable estate; the said *George Douglas*, being so seized and possessed, duly made and published his last will and testament, in writing, bearing date the 12th day of *March*, 1831, whereby, after directing all his just debts to be fully paid, he continued his said will, in the words following, that is to say, "I give and bequeath unto Mrs. *Margaret Stoddart*, wife of *James Douglas Stoddart*, Esq., now residing with me, 50,000*l.*, 3*l.* per cent. consolidated annuities, to be transferred, within six months after my decease,

*A testator devised and bequeathed all his freehold estates together with the use of his household goods, and live and dead stock, used in and about his said estates, unto Margaret S. for and during the term of her natural life, for her independent use and benefit, remainder to the husband of Margaret S. for life, remain-*

*der to the use of the heirs of the body of the said Margaret S. in tail, remainder to Alexander H. for life, with remainders over; and the testator declared that all the aforesaid settlements were intended by him to be in strict settlement with remainder to his own right heirs for ever. Held, that Margaret S. took an estate in tail general, in the testator's freehold estate,*

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to her, or as she shall direct, for her own sole and separate use, independent of her husband. And I give, devise, and bequeath all my manors, messuages, farms, lands, tithes, tenements, and hereditaments, at *Chilston* and elsewhere, in the county of *Kent*, with every of their rights, members, and appurtenances, together with the use of all my household goods, plate, linen, horses, and other cattle, and all my farming and gardening live and dead stock, implements, and utensils, used in about my said estates, unto the said *Margaret Stoddart* for and during the term of her natural life, for her independent use and benefit; and from and after her decease, I give, devise, and bequeath, all and every, my said manors, messuages, farms, lands, tithes, tenements, hereditaments, and premises, with the goods and chattels therein and thereon, as aforesaid, unto and to the use of the said *James Douglas Stoddart*, for his natural life, with remainder to the use of the heirs of the body of the said *Margaret Stoddart* in tail; with remainder to the use of my nephew the *Rev. Alex. Houstoun*, for his natural life, with remainder to the use of the heirs of his body in tail; with remainder to the use of my niece *Elizabeth Houstoun* for her natural life, with remainder to the use of the heirs of her body in tail; with remainder to the use of my cousin *Aretas Akers*, (son of the late *Aretas Akers*, Esq.,) for his natural life, with remainder to the use of the heirs of his body in tail. And I do hereby declare that all the aforesaid limitations of my estate are to be intended by me to be in strict settlement, with remainder to my own right heirs for ever." And after giving a plantation in the island of *Greneda*, with the personal estate thereon, to the said *James Douglas Stoddart*, his heirs, executors, administrators, and assigns, for ever, and another plantation, in the island of *Tobago*, with the personal estate thereon, to *George Stoddart*, (a brother of the said *James Douglas Stoddart*,) his heirs, executors, administrators, and assigns, for ever; and after giving various specific and pecuniary legacies free of legacy duty, the said testator continued his will in the words following, that is to say, "And as to all the rest, residue, and remainder, of my estate and effects, whatsoever and where-soever, real and personal, I do hereby give, devise, and bequeath the same unto *William Congreve*, *Ralph Dunn*, and *John Morison*, Esquires, their heirs, executors, and administrators, upon trust to convert the same into government securities in their own names, and to pay to the said *Margaret Stoddart*, or to empower her to receive and take the interest and dividends thereof for her natural life, for her sole, separate, and independent use and benefit; and from and after her decease, to pay, assign, and transfer, one moiety or equal half part of all such residue, unto the said *Rev. Alex. Houstoun* for his own absolute use and benefit, and the other or remaining moiety or half part thereof, unto my relation *Aretas Akers*, son of the late *Aretas Akers*, Esq., for his own absolute use and benefit. And the said testator appointed the said *William Congreve*, *Ralph Dunn*, and *John Morison* executors of his said will; the testator departed this life on the 15th day of *May*, 1833, without leaving any child or issue, or any brother or sister, or issue of any brothers, him surviving, but leaving the said *Alexander Houstoun Douglas*, the son of his only sister, his nephew and heir at law, him surviving; and also leaving the several other persons in his said will named, him surviving.

After the testator's death, the said *James Douglas Stoddart* obtained his majesty's license to assume the surname of *Douglas*.

The question for the opinion of the Court was, what interest did the plaintiff take, under the will of the said *George Douglas*, the testator, in the real estates of the testator at *Chilston* and elsewhere, in the county of *Kent*.

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May 26.

*Spankie*, Serjt., for the plaintiff, *Margaret Stoddart*.—*Margaret Stoddart* took an estate tail in the testator's real estates. The devise to her for life, with remainder to the heirs of her body in tail, would clearly give her that estate, according to all the authorities. *Shelly's case* (a), *Legat v. Sewell* (b), *Goodright v. Pullyn* (c), *Coulson v. Coulson* (d), *Hayes v. Ford* (e), *Robinson v. Robinson* (f), *Poole v. Poole* (g), *Doe v. Jesson* (h), *Sayer v. Masterman* (i), *Justen v. Taylor* (k), *Wright v. Pearson* (l), *King v. Burchell* (m), *Jones v. Morgan* (n). Then the subsequent declaration made by the testator, that he intended the limitations, in strict settlement, is not sufficient to induce the Court to put any other construction upon the will. The expression "strict settlement" is a mere conventional term used by conveyancers, but a Court of law cannot interpret it. If the words are looked at with a view to ascertain the testator's intention, no certain meaning can be discovered: they may mean a strict settlement in males or females; or the testator may intend, that if the plaintiff had a son, who afterwards died in her lifetime and before the birth of a second son, then that the second son should take the estate before an elder daughter. It is clear that the testator had first given an estate tail to the plaintiff, and that intention must exist until another, which is inconsistent with it, can be clearly seen. *Measure v. Gee* (o).

*Taddy*, Serjt., for the defendants, *Aretas Akers* the elder, and *Aretas Akers* the younger.—The plaintiff took only an estate for life. It is evident that this was the leading intention of the testator, because he first gives the plaintiff an estate for life, in express words. And it may be collected from other parts of the will, that the testator did not mean that the first taker should have the power to defeat his intention, by suffering a recovery. Thus he gives the plaintiff the use of certain personal property during her life, and he afterwards limits the estate to the use of the heirs of her body *in tail*, thereby shewing that he intended that the heirs should take as purchasers in succession; otherwise the words "in tail" were unnecessary. And that intention is still more clearly expressed by the declaration that the limitations were intended to be a strict settlement. In *Doe d. Wood v. Wood* (p), the judges use the words "in strict settlement" as an expression which is familiarly known; and it could not have been used with any other intention, than to prevent the estate tail from being destroyed by the tenant for life.

The rule in *Shelly's case* (a) is a rule of tenure, and not a rule of construction, and had its origin in considerations of a feudal nature. It merely decided, that the heir should take by descent, and not by purchase. *The Proport of Beverley's case* (q). That rule is often confounded with another rule,

(a) 1 Rep. 94.

(b) 1 Pere Wms. 87.

(c) 2 Lord Ray. 1437.

(d) 2 Stra. 1125; 2 Atk. 246.

(e) 2 W. Black. 608.

(f) 1 Burr. 38.

(g) 3 Bos. & Pul. 620.

(h) 2 Bligh, 1; 5 M. & Sel. 95.

(i) Ambler, 344.

(k) 1 Eden, 361.

(l) 1 Eden, 119.

(m) 1 Eden, 424.

(n) 1 Bro. C. C. 206.

(o) 5 B. & Ald. 910.

(p) 1 B. & Ald. 522.

(q) 40 E. 3, fol. 9, a b.

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which has respect to the intention of the testator, but which depends upon an entirely different principle. Upon the principle to be collected from the following authorities, it will appear that the rule in *Shelley's case* is not applicable to the present case. *Archer's case* (s), *Goodtitle v. Herring* (t), *Lisle Grey* (u), *Low v. Davies* (s), *Doe d. Long v. Laming* (y).

*Atcherley*, Serjt., for the defendants, *A. H. Douglas* and *Elisabeth Houghton*, in addition to the argument of *Taddy*, Serjt.—This is a question of construction; and it is manifest that the testator intended to give the plaintiff an estate for life only. In *Hodgson v. Ambrose* (s), *Buller*, J., says upon the subject, "If a testator make use of legal phrases or technical words only, the Court are bound to understand them in the legal sense. They have no right nor power to say, that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law. But if a testator use other words, which manifestly indicate what his intention was, and shew a demonstration that he did not mean what the technical words import, in the sense which the law has imposed upon them, that intention must prevail, notwithstanding he has used such technical words in other parts of the will. Lord Hardwicke truly said, in *Bagshaw v. Spencer*, 'There can be no magic or particular force in certain words more than others; their operation must arise from the sense they carry.' And I say, that sense can only be found by considering the whole will together. There is no rule better established than that the intention of a testator, expressed in his will, if consistent with the rules of law, shall prevail. That is the first and great rule in the exposition of all wills; and it is a rule to which all others must bend." *Doe d. Long v. Laming* (y), *Le v. Mosley* (a), *Doe d. Gallini v. Gallini* (b). The opinions of the judges were very much divided in *Jesson v. Wright* (c). In *Doe d. Duke of Devonshire v. Cavendish* (d), Lord Mansfield spoke of the import of the words "strict settlement" as being well known. He there says, in reference to the will of Lady Burlington, "Suppose she had only said, at the time of making her will, that she meant it to go to the grandchildren, it must have been inquired, whether absolutely, or in strict settlement. If so, her answer must have been—'In strict settlement.' There are two kinds of settlement; one by which the issue of the person to whom the first limitation is made, shall certainly take, by giving the first taker only an estate for life; the other by creating an estate tail in the first instance. But then there is a trick in law, by which, when the issue arrives at twenty-one, the entail may be barred. If this had been represented to Lady Burlington, her answer would have been, that she was very sorry for it, as it might be a means of defeating her purpose; but then it would be answered to that again, that there was a trick against that to make a strict settlement. That was meant, but to guard against all events, she said—'I will put the father in my place, and give him authority, if he choose to execute it.' If the words 'in strict settlement' had been used, nobody could have doubted her meaning. Now all the words in the language, except those, are used

(s) 1 Rep. 67.  
(t) 1 East, 264.  
(u) 2 Lev. 223.  
(s) 2 Lord. Ray. 1561.  
(y) 2 Burr. 1100.  
(e) Doug. 341.

(a) 1 Young & Collier, 589.  
(b) 5 B. & Adol. 621.  
(c) 2 Bligh, 1; 5 M. & Sel. 85.  
(d) Cited in *Griffith v. Harrison*, 4 T. 741.

carry this power as far as possible, and to shew that she meant an appointment of a strict settlement. Whatever he might do with his own estate, he might do with this; that was her intention, only that the children were the objects. What is the use of powers? It implies a strict settlement, with power to make mortgages, leases, and raise portions." The same words are commented upon in *Le Hunte v. Hobson* (f). *Mandeville's case* (g) is very similar to the present (h).

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*Spankie*, in reply.—The words "strict settlement" have acquired no fixed meaning; and if the testator intended to limit the estate, according to the construction contended for by the defendants, he has not sufficiently expressed his intention. [Tindal, C. J.—You say there are no trustees to preserve contingent remainders?] Yes; and they would have been appointed by the testator, if he had intended so to limit the estate. As to the cases which have been cited, they do not alter the general position, that when a devisee takes an estate for life, with remainder to his heirs in tail, then the heirs take by descent, and not by purchase. It is not contended, that the general rule of law may not bend to the intention of the testator, but then a clear, distinct, and unqualified intention that the rule should not apply, must be manifest.

The following certificate was sent during this term:—

"We have heard this case argued, and we are of opinion that the plaintiff took, under the will of *George Douglas*, the testator, an estate in tail general in the real estates of the said testator at *Chilston* and elsewhere, in the county of *Kent*.

N. C. TINDAL.  
J. A. PARK.  
J. VAUGHAN.  
T. COLTMAN."

(f) 5 B. & Cress. 903.  
(g) Co. Lit. 24 b.

(h) But see Har. & Butler's Notes to Lib.  
1, Notes 151, 152.

## DOE d. MINGAY v. ROE.

Nov. 3.

J. BAYLEY moved for judgment against the casual ejector. There were four tenants in possession of the demised premises: the affidavit stated, that personal service had been effected on three of the tenants, but, as to the fourth, the service was on the tenant's wife, who was not shewn to be living with her husband, or on the demised premises.

TINDAL, C. J.—You may take a rule for judgment against the three who have been formally served; but we cannot grant even a rule nisi, as to the other tenant.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute as to three tenants.

s 2

Where there were four tenants in possession, and personal service of the declaration in ejectment had been effected on three of them, but an irregular service on the fourth; judgment against the casual ejector was granted against the three who had been duly served.



Nov. 7.

## WRAITH v. HARRIS.

The affidavit of the due execution of a warrant of attorney signed by a marksman, should shew that it was read over to him. It is not sufficient to state that it was duly executed.

**HODGES** moved for leave to enter up judgment on a warrant of attorney, signed by a marksman. The affidavit of the due execution was made by the attesting witness, who stated that the warrant of attorney was duly executed by the defendant, and that the defendant did sign and seal, and as his act and deed deliver it, in the presence of the deponent. It was not stated that the document had been read over to the defendant before it was signed.

**TINDAL, C. J.**—The affidavit is not sufficient. The attesting witness should state that the document was read to the defendant.

**VAUGHAN, J., BOSANQUET, J., and COLTMAN, J.,** concurred.

Rule refused.

Nov. 10.

## BADEN v. FLIGHT.

The plaintiff declared in covenant for two quarters' rent, ending on the 25th *March*, 1836. The defendant pleaded that no quarter's rent, ending on the 25th *March*, 1836, was in arrear; and the defendant pleaded *non est*. Upon demurrer the plea was held bad, and after judgment for the plaintiff, he obtained a judge's order for leave to amend the declaration on payment of costs, by withdrawing the claim of one quarter's rent. The defendant afterwards applied to set aside the order, upon the ground that he ought to be allowed the costs of the demurrer, held, that he was not entitled to those costs.

**THE** plaintiff declared in covenant for two quarters' rent, ending on the 25th *March*, 1836. The defendant pleaded that no quarter's rent, ending on the 25th *March*, 1836, was in arrear; but, upon demurrer, the plea was held to be bad, and judgment was given for the plaintiff (*a*).

The plaintiff afterwards, (*May 3*.) obtained a judge's order to amend the declaration, upon payment of costs, by withdrawing the claim of one quarter's rent; and the costs of the amendment were paid to the defendant, on the 3d of *June*.

On the 6th of *June* the usual order was obtained for time to plead to the amended declaration, and on the 10th of *June* the defendant applied for a *rule nisi*, to set aside the order made on the 3rd of *May*, upon the ground that the costs of the plea and demurrer ought to have been allowed to him inasmuch as the plaintiff had withdrawn his claim to the quarter's rent to which the plea was applicable.

**Wilde, Serjt.**, shewed cause, and contended that the defendant was not entitled to claim the costs of a demurrer, which had been decided in favour of the plaintiff, but that the plaintiff was entitled to amend his declaration on the usual terms; and that, at all events, the application to set aside the judgment order came too late after the defendant had acted upon it.

**Hoggins**, in support of the rule, urged that the whole of the costs ought to have been given to the defendant, as the plaintiff, by withdrawing his claim to the one quarter's rent, admitted that the defendant was justified in refusing the payment of it.

**TINDAL, C. J.**—I am not sure that the plaintiff ought not to have required the defendant to pay the costs of the demurrer. As the matter stands now

(a) See *Baden v. Flight*, ante, 141.

defendant seems to be benefited, and there is no pretence for making the present application, especially after the defendant has acted upon the judge's order. The rule must be discharged.

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BADEN  
v.  
FLIGHT.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

FERGUSON, Assignee of SMITH, a Bankrupt, v. NORMAN.

Nov. 11.

**BARSTOW** had obtained a rule nisi, calling upon the defendant to shew cause why the arbitrator, to whom this cause had been referred, should not re-consider his award, or make a supplemental award.

The action was brought by the assignee of a bankrupt against the defendant, who was a pawnbroker, and the question was, whether the defendant, in receiving goods in pledge from the bankrupt, had observed the directions of the 39 and 40 Geo. 3, c. 99, sec. 6. That section requires that the pawnbroker shall enter pawns in a book to be kept for that purpose, and shall also deliver to the pawner a written memorandum containing a description of the goods pawned and the sum advanced, and the name and place of abode, and number of the house, if said to be numbered, of the person or persons by whom such goods or chattels are so pawned, pledged, or exchanged, and whether such person is a lodger or housekeeper, as aforesaid, by using the letter L, if a lodger, and the letter H, if a housekeeper; and also the name and place of abode of the owner or owners thereof, according to the information aforesaid. By an order at Nisi Prius, the cause was referred to a barrister, who was empowered to state the facts in his award, for the purpose of obtaining the opinion of this Court, as upon a special verdict. The award was made, and the case came on for argument in *Trinity* Term, but the arbitrator merely stated, in the award, that the duplicates had the word *Pimlico* upon them, but did not state, affirmatively, whether the defendant had observed the directions contained in the Pawnbrokers' Act. The Court thereupon directed that the matter should be referred back to the arbitrator, that he might state whether the defendant had inquired the number of the house in which the pawner lived. The arbitrator made an amended statement, but merely found that the defendant inquired the address of the pawner, without saying whether he had inquired the number of the house in which he lived.

Where an arbitrator was empowered to state facts, on his award, for the opinion of the Court, as upon a special verdict, the Court sent the award back to be amended, on the ground that the arbitrator had not found an important fact with sufficient precision.

*Petersdorf* shewed cause on behalf of the defendant, and contended that the plaintiff was bound to prove his case affirmatively, *Williams v. East India Company* (a); and that the arbitrator had stated enough to shew that the directions of the statute had been complied with.

*Barstow* was heard in support of the rule.

TINDAL, C. J.—The right course is, that the arbitrator should find this

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fact with more precision; the matter must therefore be referred back to him, and he may re-examine the same witnesses, or require other evidence.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute.

Nov. 22.

## TUCKER v. NECK.

In an action on an attorney's bill which was not taxable, a verdict was taken for the plaintiff by consent, subject to a taxation of the bill before the fifth day of the next term. The defendant, instead of taxing the bill, applied for a new trial, and caused the taxation to stand over until after the fifth day of the term. *Held*, that the plaintiff was not bound afterwards, to submit his bill to taxation.

**ASSUMPSIT** on an attorney's bill, which did not contain any taxable item. A verdict was taken, by consent, for 32*l.*, at the sittings after Trinity Term, subject to the taxation of the plaintiff's bill, before the fifth day of *Michaelmas* Term then next.

*Mansel* applied to the Court to compel the plaintiff to proceed with the taxation, and the affidavit disclosed the following facts. The plaintiff and defendant attended to tax the bill, on the first day of *Michaelmas* Term, but an objection was then made by the defendant, that the officer of the Insolvent Debtors' Court ought to tax certain items, and the taxation was not further prosecuted. The defendant, subsequently made an ineffectual application to the Insolvent Court; and also applied to this Court for a new trial, upon the ground that fresh evidence had been discovered, but the application was refused. On the 13th day of the term, the plaintiff proceeded to tax his costs in the action, but refused to allow his bill to be taxed.

*Wilde*, Serjt., who shewed cause in the first instance, contended that under these circumstances, the defendant had been guilty of negligence, and was not entitled to have the bill taxed.

**TINDAL, C. J.**—This bill was referred to taxation by consent, and the plaintiff stipulated that the taxation should take place before the fifth day of *Michaelmas* Term. It seems to me that the defendant has altogether passed by an opportunity which was afforded him to tax the bill, and that this application ought not to be granted.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule refused.

Nov. 10.

## BRASHOUR v. RUSSELL.

1. Where the plaintiff delivered a true copy of a *capias* to the sheriff, in pursuance of stat.

2 W. 4, c. 39, s. 4, but the sheriff's officer made another copy, which stated that the writ was issued in the reign of *William* the Fourth, instead of *Queen Victoria*. *Held*, that this was an irregularity only, within Reg. 10 Mich. T. 3 Wm. 4.

2. The defendant was arrested on the 19th of *October*, and the application for his discharge was made on the 2nd of *November*. *Held*, too late, and that the application ought to have been made within eight days.

**WILDE**, Serjt., had obtained a rule *nisi*, calling upon the plaintiff to shew cause, why the service of the copy of a writ of *capias*, should not be set aside, and why the defendant should not be discharged out of the custody of the sheriff. The writ was issued on the 7th of *September*, 1837, i

the name of Queen *Victoria*; the defendant was arrested on the 19th *October*, but in the copy of the writ which was served upon him by the sheriff's officer, it was stated that the writ was issued in the reign of *William* the Fourth. No proceedings were taken by the defendant until the first day of this term, when the rule *nisi* was obtained.

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*W. H. Watson* shewed cause, upon an affidavit which stated that the plaintiff had caused a regular copy of the writ to be delivered, with the writ, to the sheriff; and that the incorrect copy was in the hand-writing of the sheriff's officer.—As the writ was regular, the arrest was regular also, and the plaintiff ought not to be prejudiced by a mistake made by the sheriff's officer. By 2 W. 4, c. 39, sec. 4, it is directed that copies of all process shall be delivered by the plaintiff to the sheriff; and that the sheriff shall, after the execution of the process, cause one such copy to be delivered to every person upon whom such process shall be executed. Here the plaintiff delivered a true copy, and the sheriff was bound to deliver that identical copy, when he made the arrest. The duty of the plaintiff's attorney was at end, when he had delivered a regular writ, and a true copy, at the sheriff's office. In *Hodd v. Langridge* (a), *Coleridge*, J., lays stress on the fact that the plaintiff had not shewn that he delivered a true copy to the sheriff. The defendant's remedy must be against the sheriff. [*Tindal*, C. J.—If the statute has directed a certain mode of proceeding, why is the defendant to remain in custody upon an irregular, and therefore illegal arrest. It makes no difference whether it happens through the default of the sheriff, or of the plaintiff's attorney. Suppose no copy at all had been delivered?] At the moment the arrest was made, it was a good arrest, and the irregularity occurred afterwards. [*Coltman*, J.—If the *detention* is illegal, the party is entitled to his discharge.] At all events, the defect in the copy only amounted to an irregularity within Reg. Mich. T. 3 W. 4, 10, and the process was not void. The defendant was therefore bound to apply to a judge promptly, to set aside the proceedings for irregularity. Reg. Hil. T. 2 W. 4, Reg. 1, s. 33. *Fowell v. Petre* (b). *Cox v. Tullock* (c). *Primrose v. Baddeley* (d). In the present case, twenty-three days had elapsed.

*Wilde*, Serjt., *contrd.*—The statute which requires that a true copy of the process shall in all cases be delivered, was made for the protection of defendants; and it makes no difference whether the irregularity is occasioned by the sheriff, or by the plaintiff in the suit. In either case the defendant is entitled to his discharge. As to the length of time which has elapsed, it is sufficient for the defendant to say—"I am now, at this moment, in custody under process which is irregular." The omission in this case, is not in contravention of any rule of court, but of a statute; and in all such cases the rule is held more strictly. *Nicol v. Boyne* (e).

*TINDAL*, C. J.—It appears to me that this application comes too late; and it is the fault of the defendant that he has not shewn any excuse for neglecting

(a) 5 Dow. 721; Wil., Wol., & Dav. 379.

(b) 5 Dowl. 276; 2 Har. & Wol. 379.

(c) 1 Cr. & Mee. 531.

(d) 2 Dowl. 350; and see *Esdaile v. Davis*, 1 Wil. Wol. & Hodges, 35.

(e) 2 Dowl. 761; 3 M. & Scott, 812.

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to apply to a judge at chambers. It is a rule which has long been acted upon, that unless some good reason can be shewn for the delay, all applications to discharge a defendant out of the custody of the sheriff, on the ground of irregularity, ought to be made within the ordinary time for putting in bail, that is within eight days. The question turns on this,—whether this defect in the copy of the writ, was an irregularity merely, or whether it rendered the arrest altogether illegal. It seems to me to range itself exactly under the tenth section of Reg. Mich. T. 3 W. 4, which directs that “If the plaintiff or his attorney shall omit to insert in, or indorse on any writ, or copy thereof, any of the matters required by the said act, to be by him inserted therein or indorsed thereon, such writ or copy thereof, shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any judge.” It is clear, therefore, that this would only be treated as an irregularity; and, if that be so, the case comes within the other rule as to irregularities, and the application is made too late. I do not think it necessary to go into the other question, but I feel very little doubt upon it, and that the plaintiff must look over to the sheriff, for his remedy.

BOSANQUET, J.—I am of the same opinion. The case seems to fall precisely within the 10th sec. of the rule of Mich. T. 3 W. 4, and it is clear that all irregularities must be taken advantage of within a reasonable time. In *meane* process, eight days have been held to be a reasonable time, as I find by a manuscript note in my possession, of a case in the Exchequer. On the other point, I should be sorry to be thought to entertain any doubt that it amounted to an irregularity.

COLTMAN, J., concurred.

Rule discharged (a).

(a) See *Daly v. Mahon*, post. *Ex parte Burgess*, 1 Wil. Wol. & Hodges.

Nov. 18.

### CHARNOCK v. LUMLEY.

The plaintiff sued the defendant for money had and received by the publication of a book on the plaintiff's account. *Held*, that, for the purpose of pleading, the defendant was entitled to inspect an agreement in the plaintiff's possession, which contained the terms upon which the defendant undertook to publish the book.

**BARSTOW** obtained a rule *nisi*, calling upon the plaintiff to shew cause why the defendant should not have the inspection of an agreement, for the purpose of enabling him to plead to this action. It appeared, by the affidavits, that the defendant had published a book of which the plaintiff was the author, upon certain terms stated in the agreement; only one copy of the agreement was made, and that was in the possession of the plaintiff. The plaintiff commenced an action for money had and received to his use, and informed the defendant that it was brought in respect of the proceeds of the sale of the book. It was also stated that the defendant was unable to plead without being allowed to inspect the agreement. The matter had been before *Park, J.* at chambers, who referred the parties to the Court.

*Wilde, Serjt.*, and *Hindmarch*, shewed cause.—The defendant has pleaded to the action. [*Vaughan, J.*—He was obliged to plead whilst this application was pending, and the defendant swears he cannot proceed with the action without the inspection.] There are cases where one party who holds a single

copy of a deed has been compelled to produce it, but that is on the ground of his being a trustee. That doctrine does not apply here. The Courts have frequently refused to allow the parties in a suit to inspect private documents, as letters and log-books.

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*Barstow*, in support of the rule, cited *Blakey v. Porter* (a), where it was held, that if one part only of an indenture is executed, the Court will compel the party having the custody of it to produce it for inspection, upon an action being commenced by the other party.

TINDAL, C. J.—The case comes within the spirit of the rule which allows a plaintiff to inspect documents. If an action had been founded upon this agreement, the plaintiff would have had a right to inspect it for the purpose of preparing the declaration. It appears to me, therefore, that this rule ought to be absolute.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule absolute (b).

(a) 1 Taunt. 386.

(b) *Smith v. Winter*, 1 Horn. & Hurl, 45.

## OWEN v. KNIGHT.

Nov. 11.

TROVER to recover an indenture of lease. The declaration stated that the plaintiff was possessed, as of his own property, of an indenture of lease, made between one *R. Sadler*, of the one part, and one *S. Feary* of the other part, whereby certain premises were granted to *Feary*, for a term of years, which the defendant converted to his own use.

*Pleas.* First—Not guilty. Secondly—That the plaintiff was not possessed, as of his own property, of the indenture in the declaration mentioned. Thirdly—That *Feary* was the owner of the indenture, and had assigned the premises to the plaintiff by way of mortgage, and that the plaintiff afterwards re-delivered the indenture to *Feary*, for the purpose of raising money, by a deposit of it to enable *Feary*, to pay a bill of exchange drawn by the plaintiff, and accepted by *Feary*; and that *Feary*, with the plaintiff's consent, appeared to be the owner of the indenture, and, on the 23d May, 1836, by deed, assigned it to the defendant as a security for the repayment, by *Feary*, of 150*l.* then advanced; that the defendant received the indenture without notice of the claim of the plaintiff, and that the money due on the security of the deposit, remained unpaid, wherefore he refused to deliver the indenture to the plaintiff. Issues were joined on all the pleas.

At the trial, before *Vaughan*, J., at the sittings in *Easter* term, the plaintiff proved a demand of the deed, and a refusal to deliver it up by the defendant; but the defendant having proved the facts alleged in the third plea, a verdict was found for the defendant on the issue raised on that plea, and also on the issue on the second plea.

*Talfourd*, Serjt., obtained a rule *nisi*, for a new trial, on the ground of misdirection. He contended that the issue on the second plea ought to have been found for the plaintiff.

In trover for a deed the defendant pleaded that the plaintiff was not possessed of the deed as of his own property. *Held*, that under this issue, the defendant was entitled to shew that the plaintiff delivered the deed to F. for the purpose of enabling F. to raise money, and that the defendant had lent F. a sum of money on the security of an assignment of it.

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*Bompas*, Serjt., and *Godson*, shewed cause. The plaintiff authorized *Feary* to raise money for his use, upon the security of a deposit of the lease, and after having done so, he cannot recover upon the second issue. To enable a plaintiff to recover in trover, he must shew that he is entitled to the possession of the chattel sought to be recovered, as well that he has a right of property in it; that was expressly decided in *Gordon v. Harper* (a). In that case, goods leased as furniture with a house, had been wrongfully taken in execution, by the sheriff; and it was held that the landlord could not maintain trover to recover the goods, pending the lease, because he had not the right of possession as well as the right of property. Here the plaintiff had parted with the possession of the lease, and he could not claim to have it restored to him until the money which was borrowed was repaid. *Philips v. Robinson* (b).

*Talfourd*, Serjt., and *R. V. Richards*, *contra*.—The plaintiff had an assignment of the premises made to him by *Feary*, and, therefore, he was the legal owner of the original lease, at the time the action was brought. The property in title-deeds does not pass, unless the premises to which they refer are also conveyed away. The cases which are cited, were decided before the New Rules of Pleading. The effect of the allegation is, that the plaintiff was the owner of the indenture, not that he was entitled to the possession of it. *Bailey v. Fermor* (c) is an authority for the plaintiff.

TINDAL, C. J.—It becomes unnecessary to give any opinion upon the effect of the plea of "Not guilty," as the whole case turns upon the second issue. This is an action of trover to recover an indenture of lease, and, as is usual, the plaintiff states, in the declaration, that he was lawfully possessed of the indenture, as of his own property. The defendant joins issue upon this precise allegation, and the question, therefore, is, whether the facts which were proved, are such as to entitle the plaintiff or the defendant to the verdict. It is clear that the action of trover lies only where the plaintiff has the right to the possession of the chattel sought to be recovered, as well as the right of property. That was decided in the case of *Gordon v. Harper* (a), which has long been acquiesced in as law. The facts in the present case were, that the plaintiff was entitled to the indenture of lease, as of his own property, and that *Feary*, with his assent, delivered it to the defendant, as a security for an advance of money, which the defendant made, to pay off a bill upon which the plaintiff and *Feary* were both liable. The plaintiff was, therefore, entitled to the property in this deed, but not to the possession of it until the money advanced by the defendant had been repaid. Until that time the defendant was entitled to the right of possession. Therefore, the verdict was right, and this rule must be discharged.

VAUGHAN, J.—I am of the same opinion. The question is, what did the second plea put in issue? A party must have the right of possession, as well as the right of property, or he cannot maintain trover. Here it was proved that the defendant had advanced money with the privity and consent of the plaintiff, upon the security of the deed. It has been said, that the defendant may have waived his lien: it is true that if he had set up a title inconsistent

(a) 7 T. R. 9.

(b) 4 Bing. 106.

(c) 9 Price, 262.

with his lien, he could not fall back upon it; but if he says nothing about it, when a demand is made, he may rely upon it afterwards. That appears by the cases of *White v. Guiner* (f) and *Boardman v. Sill* (g).

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BOSANQUET, J.—The declaration alleges that the plaintiff was possessed of the indenture of lease, as of his own property, and if this had not been traversed it would have been admitted; but it is put in issue, and the evidence shewed that at the time the demand was made, the plaintiff was not entitled to the possession of the indenture.

COLTMAN, J., concurred.

Rule discharged.

(c) 2 Bing. 28.

(f) 1 Campb. 410 n.

LUMLEY and others, Executors of ROBERT LUMLEY, deceased,  
v. MUSGRAVE.

Nos. 3.

ASSUMPSIT on a bill of exchange for 508*l.*, dated 29th October, 1835, drawn by one *Joseph Hudson*, payable to his order, four months after date, and accepted by the defendant, and afterwards indorsed by *Hudson* to *Robert Lumley*, deceased. The declaration also contained counts for interest of money lent in the lifetime of *Robert Lumley*; and for money due on an account stated with him.

The defendant pleaded, to the first count, that, after the cause of action in the first count of the declaration mentioned had accrued to the said *R. Lumley*, deceased, and before the commencement of the suit, on the 14th June, 1836, the said *R. Lumley*, deceased, made and drew, produced and shewed, to the defendant, a certain paper writing, stamped with a bill of exchange stamp of the value of 12*s.* 6*d.*, and purporting to be a bill of exchange, addressed to the defendant, whereby the defendant was requested to pay to the order of such person as should thereafter sign and place his name thereto as the drawer thereof, the sum of 508*l.*, three months after the date thereof, for value received. And it was then agreed, by and between the said *R. Lumley*, deceased, and the defendant, that the defendant should write and sign his name on the said paper writing, so purporting, as aforesaid, to be a bill of exchange, as the acceptor thereof, and should deliver the same, so signed with the defendant's name as aforesaid, to the said *R. Lumley*, deceased, and that the said *R. Lumley*, deceased, should forbear to sue the defendant in respect of the said cause of action, in the first count of the declaration mentioned, until the expiration of the time, in and by the last-mentioned paper writing, so purporting, as aforesaid, to be a bill of exchange, and the custom and usage of merchants in that behalf limited, and appointed, for the payment of the money therein mentioned; and also that if, at any time after the expiration of the said last-mentioned period of time, and before any action commenced for the cause of action, in the said first count of the declaration mentioned, the defendant should pay and satisfy to the holder thereof the amount of the money mentioned in the said

In an action on a bill of exchange by the indorsee against the acceptor, with a count for interest and in an account stated, the defendant pleaded that a second bill was drawn and accepted in full satisfaction and discharge of the first bill, and that the second bill was duly paid. It was in evidence that the first bill remained in the hands of the indorsee, and that the acceptor had acknowledged that interest was due in respect of it, whereupon the jury returned a verdict for the amount of the interest, notwithstanding the defendant proved that the second bill had been paid. Held, that the verdict ought to stand.



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paper writing, so purporting to be a bill of exchange, and satisfy and discharge all causes of action, and should also pay and satisfy and discharge the costs and charges of any action or actions which might or should arise or be brought on the said paper writing, so purporting as aforesaid, to any person or persons to whom such cause of action should or might accrue, that such payment, satisfaction, and discharge *should be accepted in full satisfaction and discharge of the said cause of action, in the said first count of the declaration mentioned.* That in pursuance of the said agreement, the defendant then wrote and signed his name on the said paper writing, so purporting as aforesaid, in this plea mentioned, as the acceptor thereof, and then delivered the same, so signed with his, the defendant's, name, to the said *R. Lumley*, deceased; and afterwards, on the day and year last aforesaid, the said *J. Hudson*, in the first count of the declaration mentioned, subscribed his name to the said paper writing, so purporting as aforesaid, as the drawer thereof, and then signed his name on the back thereof as an indorser thereof, to the said *R. Lumley*, deceased, who then indorsed the same to certain persons, bearing the style, firm, and description of *Jordeson and Webb*, who held, kept, and retained the same from thenceforth till the delivery thereof to the defendant, as hereinafter mentioned. The plea then averred, that the amount of this bill was paid after it became due, and after an action had been commenced by the holders; and that no actions, save and except the last-mentioned action, were ever commenced for any cause arising out of or in respect of the said bill of exchange, whereby, and by reason of the premises in this plea mentioned, the said cause of action in the first count of the declaration mentioned, became extinguished, discharged, and satisfied. There was also a plea of payment to the first count.

As to the second and third counts of the declaration, the defendant pleaded non-assumpsit, and issues were joined thereon.

The plaintiff traversed the agreement set forth in the special plea to the first count, upon which issue was also joined.

At the trial, before *Tindal*, C. J., at the last *London* sittings, it appeared that the bill of exchange mentioned in the declaration, was not paid when it became due, and that the defendant requested further time to pay it. Time was given, and nothing was done until the 14th *June*, 1836, when, in pursuance of an agreement between the parties, another bill for the same amount was drawn and accepted in the manner stated in the plea. The former bill remained in the hands of *Lumley*, the indorsee, who told the defendant that the interest on that bill was unpaid. The defendant assented to this, and promised that the interest should be paid. To shew that the transaction amounted to a mere renewal of the first bill, the defendant put in evidence a letter from *Lumley* to *Hudson*, in which the former stated that this was the last time *Musgraves's* bill would be renewed. The bill of the 14th *June* was proved to have been paid by the defendant, when it arrived at maturity; but the interest on the first bill was not paid, whereupon the present action was brought to recover it. The learned judge left it to the jury to say, first, whether the agreement set out in the plea was proved; secondly, whether the defendant promised to pay interest on the first bill, from the day it became due, until the time when the second bill was paid. The jury found a verdict for 13*l.* 15*s.* 6*d.* being the amount of the interest for the above period.

*Platt* moved for a new trial, on the ground of misdirection.—This action is

not brought on a special agreement to pay interest: but upon the bill of exchange, which was paid before the action was brought. The question is, whether any right of action continued on that bill? The interest is merely accessory to the principal money, and it would be an anomaly if the interest might be recovered when the principal sum could not. In *Hollis v. Palmer* (a) it was held, that where a promissory note was brought within the Statute of Limitations, the plaintiff was not entitled to allege in the declaration, that the defendant had paid interest upon the note, within six years. So, in *Dillon v. Rimmer* (b), where the defendant was indebted to the plaintiff on a bill which was dishonoured, and gave another bill at a longer date, and also a warrant of attorney to confess judgment in case the second bill should not be paid when due, and agreed to pay the expenses of executing the warrant of attorney: and the second bill was duly honoured, but those expenses were not paid, and the first bill was retained by the plaintiffs, it was held that they could not sue the defendant on such original bill. It may even be admitted that the defendant agreed to pay the interest, but that could not revive the bill which was paid. In *Van Sandau v. Crosbie* (c), the certificate of a bankrupt was held to be a bar, not only to the original debt, but also to an action for consequential damages arising from the non-payment of it; and *Holroyd, J.*, said—"I am of opinion that when the remedy at law is taken away for the non-payment of the money, it is also taken away as to any consequential damage arising from such non-payment." [*Tindal, C. J.*—Here there was no evidence that there had been payment in satisfaction of the original bill. The evidence was the other way.] Then *Soward v. Palmer* (d) cannot be law: there the defendant being indebted to the plaintiff, gave him a promissory note for 45*l.*, which was dishonoured; the latter afterwards agreed to accept 5*s.* in the pound, to be secured by the acceptance of a bill for 11*l.* 5*s.* by the defendant's brother, which was accordingly given, but the original note remained in the plaintiff's possession, and was to revive if the acceptance were not honoured. The bill was not paid the day it became due, but, on the following morning, the defendant tendered 12*l.* to the plaintiff, including the amount and expenses thereon, which the latter refused to accept, and brought an action on the original note; and it was held that he was not entitled to recover. [*Tindal, C. J.*—In that case there was a new consideration, as the plaintiff had taken a third person's security.] Here the payment of the second bill was equivalent to a payment of the first. *Kendrick v. Lomax* (e) *Ex-parte Barclay* (f).

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TINDAL, C. J.—It appears to me that the finding of the jury was justified by the facts which were proved at the trial. As to the objection made to the direction of the jury, I left them to say whether the agreement set out in the plea was proved by the evidence. The first bill was due in *March*, and after it became due nothing was done for some time, except that the defendant requested further time to pay it. At length, on the 14th of *June*, a second bill was drawn, for the same amount, and it was then stated that a certain sum was due for interest upon the first bill; and it appeared that the first bill was left in the hands of *Lumley*. This was sufficient to entitle the jury to say that the new bill was not given in satisfaction of the former one; and it

(a) 2 Bing. N. C. 713; 2 Hodges, 55.

(b) 7 B. Moore, 427; 1 Bing. 100.

(c) 3 B. & Ald. 13.

(d) 2 B. Moore, 274.

(e) 2 Cr. & J. 405.

(f) 7 Vesey, 596.

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clearly appeared that a promise had been made to pay interest upon it. The jury were directed to say, whether the first plea was proved; and we do not contravene any rule of law, by directing that this verdict should stand.

VAUGHAN, J.—This is moved for misdirection, but it appears to me to be rather a question of evidence. It appeared that interest was due on the first bill, and the plea was not made out by the facts.

BOSANQUET, J.—The question is, whether the second bill was given in full satisfaction of the first? It appears to me, that it was not given in full satisfaction of the damages which had accrued to the plaintiff, and therefore the verdict was right,

COLTMAN, J., concurred.

Rule refused (g).

(g) *Lumley v. Hudson* :—

THIS was an action against the drawer of the above bill, who pleaded similar pleas to those which are already stated. At the trial, before *Vaughan, J.*, the plaintiff proved that the drawer had also promised to discharge the interest which was due upon the first bill, at the time the agreement to give the second bill was made; and the defendant having failed to prove the special plea, a verdict was found for the amount of the interest. A rule *nisi*, was afterwards obtained to set aside the verdict.

*Kelly and C. Saunders* shewed cause, and relied upon the above decision in *Lumley v. Musgrave*.

*Platt and W. H. Watson*, in support of the rule, cited the cases already mentioned, and *Dickson v. Parkes*, (1 Esp. 110): and also contended, that there was a distinction between the two cases, inasmuch as the drawer was only liable to the indorsee on default of the acceptor, whereas, the acceptor, being primarily liable for the principal money, might be under an implied liability to pay the interest also.

The Court repeated the observations already reported and discharged the rule upon the same grounds.

Rule discharged.

Nov. 18.

## HOCKEN v. GRENFELL.

The defendant put a construction on an award, which induced the plaintiff to move to set it aside. The Court decided that the defendant's construction was not correct, and the rule was therefore discharged as the objection did not then arise. *Held*, that the prothonotary was correct in taxing the costs of the rule for the defendant, according to the usual practice.

**WILDE**, Serjt., obtained a rule *nisi*, on behalf of the plaintiff, to review the prothonotary's taxation of costs.

The plaintiff enjoyed the limited use of a stream of water, under the provisions of an award; and there having been an alleged interruption of his right, by the defendant, an action was commenced, which was afterwards referred to arbitration, upon the condition that the arbitrator should not award any thing which was inconsistent with the plaintiff's rights under the first award.

An award was made, by which a limited use of the water was given to the defendant. A construction was put, by the defendant, upon some ambiguous language used in the award, which, as the plaintiff contended, made the award inconsistent with the first award, and also made it bad for not being final; and he applied to the Court to set it aside upon those grounds. The two awards and certain affidavits were turned into a special case, and, after argument, the Court determined that the defendant's construction of the award was incorrect. According to this construction of the award, the plaintiff's objections could not be supported, and the rule was discharged without any mention of costs. Upon the taxation, the prothonotary taxed the costs for the defendant.

*Crowder* shewed cause.—The defendant was compelled to appear in consequence of the plaintiff's rule, and, as it was discharged, the defendant was entitled to his costs, according to the invariable practice.

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*Wilde*, Serjt., in support of the rule.—This is not a case within the ordinary rule. If the construction which the defendant put upon the award had been correct, then the objections made to the award would have been fatal, and the plaintiff's rule must have been made absolute. In that case he would have been entitled to costs. But the Court determined that the construction was wrong, and then the plaintiff forbore to press his objections, because that was virtually a decision in his favour. The argument on the other side, failed altogether. *M'Andrew v. Adam* (a).

TINDAL, C. J.—If we made this rule absolute, we should introduce an exception which would lead to difficulty in other cases. I admit that the defendant was contending for a construction which was untenable, and if the plaintiff had waited until some act had been done, which would have entitled him to apply for an attachment against the defendant, for not observing the award, the costs might have been recovered; but the plaintiff having moved to set aside the award, and the Court having held that it was a good award, the costs must follow the ordinary course.

VAUGHAN, J.—The prothonotary has taxed the costs properly.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

(a) 1 Scott, 99; 1 Bing. N. C. 270; 3 Dow. 120.

## BULNOIS v. M'KENZIE.

Nov. 25.

*SIR F. POLLOCK* obtained a rule calling upon the plaintiff to shew cause why two orders, made at chambers, should not be rescinded; and why the defendant should not be at liberty to rely upon certain objections originally stated in a notice delivered to the plaintiff, in pursuance of stat. 5 & 6 W 4, c. 83, sec. 5 (a).

(a) Sect. 5 enacts "That in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any *scire facias* to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objection on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively, at such trial, unless he prove the

objections stated in such notice: provided always, that it shall and may be lawful for any judge at chambers, on summons served on such defendant or plaintiff, or such plaintiff or defendant respectively, to shew cause why he should not be allowed to offer other objections, whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms, as to such judge shall seem fit.

1. In an action for the infringement of a patent, the Court will not compel a defendant to give the names and addresses of persons whom, in a notice of objection given under 5 & 6 W. 4, c. 83, sec. 5, he alleges to have used the invention before the patent was granted.

2. But where a judge had made two orders requiring the name and address of a person who had used the invention, and the defendant complied with the orders, the Court refused to rescind them.

3. The Court may order a further and better notice of objections, under their general jurisdiction, as well as under the statute.

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This was an action brought for the infringement of a patent granted to one *Poole*, for an improved cabriolet, and by him assigned to the plaintiff. The defendant pleaded several special pleas, and in pursuance of the 5 & 6 W. 4, c. 83, sec. 5, delivered with them a notice of the objections which he meant to rely upon at the trial. The notice contained a mere recapitulation of the objections raised by the pleas, namely: 1. That the invention was not new; 2. that *Poole* was not the first inventor; 3. that *Poole* was not in possession of the invention at the time the patent was granted; 4. that the invention had been used by other persons at the time the patent was granted; 5. that the alleged improvements were not new as to the public use thereof; and, 6. that the specification was imperfect in not shewing the application of the alleged improvements.

On the 14th *June*, the plaintiff applied to *Park, J.*, at chambers, for further and better particulars of the objections, and after counsel had been heard, on both sides, the learned judge made the order as prayed. The defendant, thereupon, amended the fourth objection, by stating that the invention had been used by one *James Hargrave Mann*, in *England*, and by divers other persons in other parts of the kingdom. The fifth was stated to be that the specification did not describe the nature of the invention; that every matter or principle stated in it was already known to the public, and open to public use, and that it contained no new combination; and the 6th, that vehicles with two wheels, drawn by one horse and entered behind, were in public use before the patent was granted, and that the specification did not set out with any certainty what the invention was.

On the 22d of *June*, the plaintiff applied to *Vaughan, J.*, at chambers, by summons, for another order, requiring the defendant to furnish the names, description, and place of abode of the persons mentioned in the fourth objection, or that he might otherwise be precluded from calling witnesses in support of that objection; and also further and better objections in lieu of the fifth and sixth. The learned judge, after hearing counsel, made an order accordingly, and, in obedience to it, the defendant specified in detail the parts of the alleged invention which were not new: and instead of the fourth, fifth, and sixth objections, substituted a minute detail of defects in the specification, and also gave a statement of the address and description of *James Hargrave Mann*.

The present rule was obtained upon the ground that, under the provisions of the statute, the defendant delivered the objections at his own peril: and that the judges had no jurisdiction, either at common law or by the statute, to compel the defendant to give a minute and detailed statement of the objections which he intended to rely upon.

*Wilde, Serjt.*, and *Hoggins*, shewed cause.—The proviso in the 5th section of the statute points expressly to a discretion being entrusted to the Court, to compel the delivery of a full notice of the objections which are intended to be raised at the trial. But, apart from the statute, the Court or a judge, have authority to interfere, by virtue of their general jurisdiction in regulating proceedings. The practice of requiring the parties in a cause to give full and accurate particulars of their demands, is not founded upon any statute; but it it depends upon a rule of convenience which has been long established. So the power to compel the parties to grant an inspection of documents, has long

been exercised with the greatest benefit to suitors. In *Blakely v. Porter* (a), where one part only of an indenture was executed, the Court compelled the party having the custody of it, to produce it for inspection, upon an action being commenced against him. Every argument used on the other side, would apply to the powers exercised by the Court in requiring defendants to give particulars of an intended set-off. The statute 2 Geo. 2, c. 22, sec. 13, which gives the right of set-off, merely requires that notice shall be given of the debt, and upon what account it became due; but it is every day's practice to compel a defendant to give particulars of the set-off. Here the notice of objections, was a mere echo of the contents of the pleas, and it is evident, by a reference to the new statute, that the information to be given in the notice should be something more than was given in the plea. At all events the judge's discretion at chambers cannot be interfered with, after it has been exercised.

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*Sir F. Pollock, and R. V. Richards, contra.*—The situation of a defendant is very different from that of a plaintiff. The former is altogether precluded from making his defence, if he is compelled to disclose his evidence to his opponent, who will then be enabled to shape his case accordingly. But the courts have always refused to compel a party in a cause to shew his evidence to the other side; and, whenever documents have been produced, it has been upon the ground that the party in whose possession they are, is holding them as a trustee. This is the first time that such an order has been made since the passing of the statute; and it is a very important question whether the Court can compel a defendant to comply with it. The defendant may go to trial at his own risk, and if the judge at Nisi Prius does not think that a sufficient notice has been given, he will reject the evidence, and the defendant may then tender a bill of exceptions. In *Crofts v. Peach* (b), which was an action for the infringement of a patent, this Court refused to compel the plaintiff to produce a specimen of the patent articles, to enable the defendant to prepare his defence to the action.

TINDAL, C. J.—This is an application to set aside two orders made at chambers; one has been complied with, and there is, therefore, no occasion for rescinding it; the other requires the defendant to give the address and description of *James Hargrave Mann*, and the other persons mentioned in the fourth objection. To a certain extent that order has also been complied with, for *Mann's* address has been given, and it is unnecessary to rescind that part of it; the only question is, whether it should be rescinded as to the names and addresses of the other persons. I think this Court has a right to model these proceedings under its general jurisdiction; and looking at the words of the statute 5 & 6 W. 4, c. 83, sec. 5, it seems to me to fall exactly within the same construction as the statutes of set-off. At the same time, there is a doubt whether, under the words "notice of objection," we ought to require the defendant to furnish the names and descriptions of those persons who are alleged to have used the invention. The order must, therefore, be rescinded so far as relates to the supplying the names and descriptions of those other persons, and

(a) 1 Taunt. 386, and see *Charnock v. Lunley*, ante, 244.

(b) 2 Hodges, 110.

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the judge at Nisi Prius will reject or admit evidence as to those persons, according to his discretion.

VAUGHAN, J.—It is true that this order is new in specie, but, looking at the recent act of parliament, it seems to me that it was intended that the defendant should give the plaintiff more specific information than the plea afforded to him. I therefore think the present notice is insufficient, as the plaintiff must now be taken by surprise, if the defendant resorts to evidence of the use of the invention by any persons except *Mans*.

BOSANQUET, J.—I entertain no doubt as to the power of the judges to order the particulars of these objections to be given. The practice as to notices of set-off is very analogous. There the defendant is required, not to disclose the evidence by which his case is to be supported, but to give a reasonable account of the nature of the transaction which he intends to prove. So here the defendant is not to lay open the proof by which he intends to support his case, and I think the order goes too far in requiring the names and descriptions of the other persons who are alleged to have used the invention. *Andrew v. Bond* (b) is in point.

COLTMAN, J.—This point ought to be decided in the same way as questions which arise under the statutes of set-off. The jurisdiction to make these orders undoubtedly exists, and the object of the legislature would be defeated, if the judges had not power to require a full statement of the grounds of objection, but so far as this order requires such very minute particulars, it appears to me that it may be modified.

Rule absolute accordingly.

(b) 8 Price, 213.

### VAUGHAN v. WILSON.

Nov. 23.

On the 6th of June, a judge's order was made by consent, which authorized plaintiff to sign final judgment immediately. On the 8th of June the defendant died, before the plaintiff had entered up his judgment. Held, that this was not a case in which the plaintiff was entitled to have judgment entered, *nunc pro tunc*, under Reg. 3. H.L. T. 4 W. 4.

**WILDE**, Serjt., obtained a rule *nisi*, to discharge an order made by Vaughan, J., on the 22nd of June, which authorized the plaintiff to enter up judgment, *nunc pro tunc*, as of the 6th of June.

Upon showing cause, the affidavits disclosed the following facts:—The plaintiff sued the defendant on a bill of exchange, and the defendant pleaded to the action, and issue was joined, and the cause was ready to be tried at the next sittings. On the 15th of May, a meeting of the defendant's creditors was held, and the plaintiff and one *Smith*, another creditor, who had also an action pending, agreed to suspend further proceedings in their actions, until a report of the state of the defendant's affairs could be made. It then appeared to be the general wish of the creditors, that an equal division of the effects should be made; but *Smith*, in breach of his agreement, afterwards proceeded with his action; whereupon, on the 6th of June, the defendant's attorney consented that a judge's order should be made, by which the defendant was allowed to withdraw his plea, and liberty was given to the plaintiff to sign judgment immediately, with a stay of execution until the 13th of June. In

consequence of *Smith's* proceedings, a fiat in bankruptcy was also issued against the defendant on the 6th of *June*; but on the 8th of *June*, before anything had been done in the bankruptcy, and before the plea was withdrawn, or the plaintiff had signed judgment, the defendant died.

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*Telford*, Serjt., shewed cause.—The judge was well justified in making this order, because the plaintiff was in a situation to have gone to trial before the defendant died, and only forbore to do so, for the purpose of enabling the defendant to come to some arrangement with his creditors. It is clear that there was no defence to the action, and after the defendant's attorney had consented to withdraw the plea, the plaintiff was in the same situation as if he had signed judgment. If the trial had taken place and the defendant had died before trial, but after the commencement of the sittings, the verdict would have stood. *Jacobs v. Miniconi* (a). In *Miller v. Spurre* (b) judgment was entered *nunc pro tunc*, where a cause had been referred to arbitration, but more than two months had elapsed since the verdict was taken. In *Green v. Cobden* (c) the Court allowed a judgment to be entered, when a delay of more than four terms had elapsed, whilst the judgment of the Court was pending.

*Wilde*, Serjt., in support of the rule.—The rights of the defendant's executors will be affected, if this proceeding is allowed, because a judgment debt will take precedence in the administration of the assets. The plaintiff was at liberty to sign judgment between the 6th and 8th of *June*, and the plea might have been withdrawn by *retraxit*, if such a step were necessary. But after the plaintiff has himself been the cause of the delay, the Court will not interfere; and the Rule of Court, Hil. T. 4 W. 4, Reg. 3, which provides that judgments shall not have relation back, becomes imperative. In all the cases where judgments have been entered *nunc pro tunc*, the delay has arisen from the act of the Court. *Bates v. Lockwood* (d). In *Lambirth v. Barrington* (e), where the defendant, on an issue tried under the Interpleader Act, died after verdict for the plaintiff, but before the judgment was signed, the Court refused to order the Rules of Court to be entered *nunc pro tunc*. And in *Lawrence v. Hodgson* (f), an application like the present was refused, upon the express ground, that the delay was the act of the party and not of the Court. *Copley v. Day* (g) is to the same effect.

TINDAL, C. J.—This case must be decided with reference to the power which the Court has to order judgments to be entered *nunc pro tunc*. The general rule was, that judgments could not be entered up after the death of the party, between verdict and judgment; but, by the stat. 17 Car. 2, c. 8, judgment may be entered within two terms after the verdict. There are also cases where the Courts have allowed judgment to be entered *nunc pro tunc*, where more than two terms have elapsed; but these are all cases where the delay has arisen by the act of the Court, and not by the act of the party. Thus in *Lawrence v. Hodgson* (f) such an application was refused on that precise ground. Here the agreement was, that the plea should be withdrawn,

(a) 7 T. Rep. 31.

(b) 2 M. & Scott, 730.

(c) Not then reported. 4 Scott, 486.

(d) 1 T. Rep. 637.

(e) 2 Bing N. C. 149; 1 Hodges, 205.

(f) 1 Y. & J. 368.

(g) 4 Taunt. 702.



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and that the plaintiff should be at liberty to sign judgment; but he did not do so on the 6th or the 7th of *June*, and on the 8th, the defendant died. It is to be observed, that the administration of the effects of the deceased will be altered, if this application is granted; it also appears to me that the plaintiff has been guilty of laches which were by no means justifiable. For these reasons, I think, we ought not to order the judgment to be entered *nunc pro tunc*.

VAUGHAN, J.—I am disposed to concur. By the Rule of Court of Hil. T. 4 W. 4, all judgments must now be entered of the day and year when they are signed; but it is competent for the Court to order a judgment to be entered *nunc pro tunc*, by which I understand that we may exercise a sound discretion upon the subject. I was at first impressed in favour of the application, upon looking at the intention of the parties, and no doubt the plaintiff was upon vantage ground, and intended to avail himself of his proceedings, but he afterwards consented to come in with the rest of the creditors. The plaintiff had the opportunity of entering the judgment, but the law favours those who are vigilant; and as the Courts have interfered only where the delay has happened by the act of the Court, I agree that this rule must be made absolute.

BOSANQUET, J.—I am of opinion that this case does not fall within the proviso contained in Rule 3 of *Hilary* Term, 4 W. 4. The agreement made between the parties, before the defendant's death, was, that the plea should be withdrawn, and that the plaintiff should be at liberty to sign judgment on the 6th of *June*. On that day the judgment might have been entered up, and it was the plaintiff's own neglect that he did not do so. Without that agreement the plaintiff would have had no power to sign judgment, and he has omitted to take advantage of it. Now the rule is that judgments shall be entered of the day when they are signed, "and shall not have relation to any other day." Then by the proviso it is competent for the Court or a judge, to order a judgment to be entered *nunc pro tunc*. That applies to cases where the delay does not occur by the act of the parties, but by the act of the Court.

COLTMAN, J.—There are circumstances in this case which would induce me to give the plaintiff relief, inasmuch as he delayed to enter the judgment for a laudable reason; but considering that the death of the defendant has intervened, and that a total alteration of circumstances has occurred, without saying that the Court has no power to interfere, I think it would not be proper to allow the judgment to be entered *nunc pro tunc*.

Rule absolute.

The Earl of HARRINGTON and others v. the Bishop of  
LITCHFIELD and COVENTRY and others.

Com. Pleas.

Nov. 17.

**QUARE IMPEDIT.**—The declaration stated, that from time immemorial there had been a certain ancient church, with cure of souls, situate in the township of *Boulton*, which was a perpetual curacy, augmented by Queen *Anne's* bounty; and that the majority of the proprietors of estates for the time being, situate within the said township, from time whereof the memory of man was not to the contrary, had nominated and presented, and had been used and accustomed to nominate and present, and of right ought to have nominated and presented, and still of right ought to nominate and present, a fit and proper person, being in holy orders, that is to say in the holy orders of priesthood, to be the perpetual curate of the said church, whenever at any time the same had or should become vacant by the death of the then incumbent thereof or otherwise, and to present the said person so nominated to the bishop of the said diocese for the time being in which the same church was situate, to wit, to the Bishop of *Litchfield and Coventry*, for the purpose of his being admitted and licensed by the said bishop to the perpetual curacy of the said church. The declaration then alleged a vacancy in the curacy, by the promotion of the Rev. *G. H. Woodhouse*, the late incumbent, to the living of *Finningley*, and proceeded, "and thereupon, afterwards, to wit, on &c., the then majority of the proprietors of estates for the time being, situate within the said township, that is to say the now plaintiffs, who then respectively were, and still are, proprietors of such estates, did nominate *William Cantrell*, clerk, then and continually afterwards, and hitherto being a fit and proper person for that purpose, and in holy orders, that is to say the holy orders of priesthood, to be the perpetual curate of the said church of *Boulton*, in the place and room of the said *G. H. Woodhouse*, as under and by virtue of the statute in such case made and provided, it was lawful for them to do, and did then present the said *William Cantrell* to the defendant *Samuel*, he then being Bishop of *Litchfield and Coventry*, and by whom the said *William Cantrell* ought to have been admitted and licensed to the perpetual curacy of the said church, &c."

The Bishop of *Litchfield and Coventry* and the Rev. *Edward Poole* pleaded separately, but those pleas were not material to the present question. The other defendants pleaded—

That before and at the time when it was in the declaration alleged that the plaintiffs were the majority of the proprietors of estates for the time being, situate within the said township, and from thence hitherto, they the defendants were and still are the majority of the proprietors of estates for the time being, situate within the said township, and then were and still are respectively proprietors of such estates. And that, after the said *G. H. Woodhouse* was so admitted, instituted, and inducted into the church of *Finningley*, to wit, on, &c., they the defendants then being the majority of the proprietors of estates for the time being, situate within the said township, and then respectively being the proprietors of such estates, did duly nominate the said *E. Poole*, clerk, to be the perpetual curate of the said church of *Boulton*, and did then, still being such majority as aforesaid, present the said *E. Poole* to the defendant *Samuel*, he

In *quare impedit*, the plaintiffs alleged, that they being the majority of proprietors of estates for the time being of the township of B., of right nominated and presented a clerk to be the perpetual curate of the church of B. The defendants pleaded that they being the majority of the proprietors of estates for the time being of the said township, nominated another clerk to the curacy, without this, that the plaintiffs were the majority of the proprietors of estates at the time of the said nomination, *modo et forma*. Replication, that defendants then being such majority of the proprietors of the said estates, did not duly nominate the clerk *modo et forma*. Held, that the replication was bad, as it traversed matter alleged in the inducement of the plea, instead of joining issue upon the plea.

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then being Bishop of *Litchfield and Coventry*, and by whom the said *E. Poole* ought to have been admitted and licensed to the perpetual curacy of the said church of *Boulton*, wherefore they, the defendants, did hinder and prevent the plaintiffs, as in the declaration mentioned, and as the plaintiffs had above thereof complained, against the defendants: *without this* that the plaintiffs were, at the time of the said nomination of the said *W. Cantrell*, the majority of the proprietors of estates for the time being, situate within the said township, in manner and form as in the declaration was alleged. Conclusion to the country.

There were other pleas which it is not necessary to mention.

*Replication*—That they the said defendants, then being such majority as in the plea mentioned, did not duly nominate the said *E. Poole* to be perpetual curate of the said church of *Boulton*, in manner and form as the defendants have above in their plea in that behalf alleged. Conclusion to the country.

*Demurrer*—assigning for cause that the plaintiffs had, in the replication, improperly traversed matter alleged in the inducement of the plea, instead of joining issue. Joinder in demurrer.

*Wightman*, in support of the demurrer.—A traverse upon a traverse is not allowed when a material traverse is tendered. Here the traverse which is tendered is material, because it denies the plaintiff's title, and therefore they were bound to support their title, as it is expressly decided in *Lady Chicheley v. Thompson* (a), and which was an action of *quare impedit*. There it is said—"but when the inducement is made and concluded with a traverse of a title shewn by the plaintiff, there the plaintiff is enforced to maintain his title, and not to traverse the inducement to the traverse." And the same principle is to be found in many authorities. *The King v. the Bishop of Worcester* (b). *Digby v. Fitzherbert* (c). *Thrale v. the Bishop of London* (d). *Thorn v. Sker- ing* (e). Com. Dig. tit. Pleader (G. 17.) In the *Cross Keys Bridge Company v. Rawlings* (f), where in an action for carelessly navigating a ship, the defendants pleaded as inducement, that the plaintiffs had narrowed the channel of a river which made the passage of vessels dangerous, and then traversed the allegation of carelessness, it was held that the defendants were not confined to give evidence to prove that the plaintiffs had narrowed the river, but that they might also show that they had not been guilty of carelessness. Here the material matter in issue is, whether the plaintiffs have a right to present to the curacy; but instead of proving their own title, they turn round and attack the title of the defendants. The plaintiffs are bound to prove that they were the majority of the proprietors of estates in the township.

*Cowling, contra*.—It appears that the church is not full; the defendants are therefore actors, and must shew a good title in themselves, in order that they may have a writ to the bishop, if the judgment of the Court should be in their favour. Com. Dig. tit. Pleader (3 I. 9.) (3 I. 12). 3 Black. Com. 250. The best form of pleading is that which raises the whole merits of the case,

(a) Cro. Car. 105.

(b) Vaughan, 58.

(c) Hobart. 106.

(d) 1 H. Black. 376.

(e) Cro. Car. 586.

(f) 3 Bing. N. C. 71; 2 Hodges, 147.

and the question is raised whether the plaintiffs or the defendants have the right to present. The traverse taken by the defendants under the *absque hoc* is immaterial, and the plaintiffs were not bound to demur, but may raise a material issue upon the inducement. It was sufficient if the plaintiffs were the majority of a majority of the proprietors, present at the meeting, when the nomination was made, and then their clerk would be duly presented. In like manner the act of a majority at a meeting of any constituent part of a corporation, has been held to be binding upon the whole body. *Quare impedit* is in the nature of trespass, and if this suit was commenced by too few persons, there ought to have been a plea in abatement. Vin. Abr. tit. Presentation (N. c.) Com. Dig. tit. Abatement (E 9,) (E 10.) If this had been an action of trespass, the defendants must have pleaded in abatement, 2 Wms. Saund. 102 (14.) *Gilbert v. Parker* (g). The plaintiffs do not allege in the declaration that *they* compose a majority, but merely that *Cantrell* was elected by a majority of the proprietors. In *Lady Chichesley v. Thompson* (h) the church was full, and no writ to the bishop was required, therefore the defendants were not bound to shew title in themselves. In *Cross Keys Bridge Company v. Rawlings* (i) it is said, that a traverse after a traverse may be allowed. Com. Dig. tit. Pleader, (G. 17. 18. 19. 20.)

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*Wightman* in reply.—The plaintiffs would be bound to prove that they were the majority of the proprietors, or they could not recover in this action; there cannot be a doubt upon that point. Nor was it necessary for the defendants to make out any title in themselves; it would be quite sufficient if they destroyed the plaintiff's title. In *Danvers v. the Bishop of Worcester* (k) it appears, that if the defendant have a judgment upon demurrer to the declaration, he shall have a writ to the bishop without making any title.

Judgment for the defendants was about to be delivered, when *Cowling* prayed leave to amend on the usual terms.

Rule accordingly.

(g) 2 Salk. 630.  
 (h) Cro. Car. 105.

(i) 3 Bing. N. C. 76. 2 Hodges, 147.  
 (k) Dyer, 246.

## DELEGAL v. HIGHLEY.

Nov. 22.

**ACTION** on the case, brought against the defendant for maliciously charging the plaintiff with a fraud, and for causing a libel respecting the charge to be inserted in a newspaper. The first count of the declaration charged the malicious prosecution, and the second and third were founded upon the libel. The defendant pleaded—1. Not guilty to the whole declaration. 2. To the 1st count, a justification of the charge; 4th, 5th, and 6th, to the 2nd count, a justification of the libel; and similar pleas to the third count. The plaintiff

After judgment for the plaintiff on a demurrer to one of several pleas of justification in an action for a libel, the Court will not allow him to withdraw a replication.

cation of *de injuria* to other pleas, which are open to the same objections, and substitute a demurrer.

2. Where there were three counts in libel, and Not guilty had been pleaded to the whole declaration, and issues in fact had also been raised, upon pleas to the first and last counts, and judgment had been given for the plaintiff, on a demurrer to a special plea to the second count, the Court allowed the plaintiff to withdraw the first and third counts from the record, on payment of costs.

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demurred to the second plea, and also to the fourth, fifth, and sixth pleas. To the pleas to the third count, he replied *de injuriâ*.

The Court held, upon the argument of the demurrer, that the second plea was bad in form as well as in substance, and that the fourth, fifth, and sixth pleas were also bad (a).

It appeared that the pleas to the third count were liable to the same objections as the pleas to the second count.

*Wilde*, Serjt., obtained a rule *nisi*, calling upon the defendant to shew cause why the plaintiff should not be at liberty to strike out the first count in the declaration, and withdraw the replication of *de injuriâ*, to the pleas to the third count, and substitute a demurrer.

*Talfourd*, Serjt., and *E. V. Williams*, shewed cause.—This application is not a matter of right, but it is made to the discretion of the Court, and in this case the plaintiff is not entitled to any favour. If the object of the action is to protect the character of the plaintiff, the issues which are raised on the record are well adapted to meet that purpose. But it is manifest that the plaintiff is desirous of avoiding the real merits of the case. [*Tindal*, C. J.—The latter part of the rule is that which I doubt about, but I do not see how you can prevent the plaintiff from striking out one of the counts in the declaration. He might enter a *nolle prosequi*.] This must be treated as an entire rule. *Strother v. Randerson* (b) and *De Rutzen v. Lloyd* (c) are authorities against this application. A record cannot be altered, when the alteration will prejudice the opposite party.

*Wilde*, Serjt., *contrâ*.—If the defendant should obtain a verdict on the issues raised on the third plea, the plaintiff would still be entitled to judgment *non obstante*; and, therefore, the Court will not compel the plaintiff to go to trial, when a demurrer will decide the question at a much less expense. From the judgment which has been already given, it is manifest that the pleas to the third count cannot be supported, and that the fault will not be cured by the verdict. The cases which have been cited, are not applicable to the present question.

TINDAL, C. J.—I feel a difficulty in saying that after the plaintiff has replied *de injuriâ*, he may be allowed to alter the course of the trial at *Nisi Prius*, by withdrawing the replication and substituting a demurrer. In the present case, the plaintiff may set himself right, because he may enter a *nolle prosequi* as to either of the counts. I think, therefore, that this rule must be discharged, the plaintiff being at liberty to withdraw the first and last counts in the declaration, on payment of costs. The costs of this rule to be costs in the cause.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

(a) See *Delegal v. Highley*, ante, 158.  
 (b) 5 Dow. 280.

(c) 5 Ado. & Ellis, 456.

## DALY v. MAHON.

Nov. 3.

**HURLSTONE** moved to discharge the defendant out of the custody of the sheriff, upon the ground that the affidavit to hold to bail was defective. He made several objections to the affidavit; but it appeared that the defendant was arrested on the 25th of *July*, and that no application to discharge him out of custody, was made to a judge at chambers until the 15th of *August*. For the purpose of accounting for the delay, an affidavit was produced, by which it appeared that the defendant was very aged, and suffering from severe indisposition; *Primrose v. Baddeley* (a) was cited to shew that if the delay was accounted for, the lapse of time was no objection, and *Rock v. Johnson* (b) where it is said, that the rule is not so strict, when objections are made by persons in custody.

Where no application was made to discharge a defendant out of the custody of the sheriff on the ground of a defect in the affidavit to hold to bail, until 21 days after the arrest, held, to be too late, and that the extreme age and infirmity of the defendant was no sufficient excuse for the delay.

**TINDAL, C. J.**—Objections to the affidavit to hold to bail, ought to be made within a reasonable time, which has been held to be within the ordinary time for putting in bail. In *Fowell v. Petre* (c) a prisoner was held to be too late after nineteen days had elapsed. I do not think any sufficient excuse has been offered, because the application did not require any personal exertion to be made by the defendant himself.

Rule refused (d).

(a) 2 Dow. 350; 2 Cr. &amp; M. 168.

(b) 4 Dow. 405.

(c) 5 Dow. 276; 2 Har. &amp; Wol. 379.

(d) See *Brasbour v. Russell*, ante, 242. *Ex parte Burgess*, 1 Wil. Wol. & Hodges.OLDROYD v. J. CRAMPTON, JOHN CRAMPTON, and  
H. WILKINSON.

Nov. 6.

**THE** declaration stated that *Thomas Oldroyd*, clerk to the trustees of the *Dewsbury* and *Leeds* turnpike road, acting under and by virtue of an act of parliament made and passed in the fifty-sixth year of the reign of his late majesty king *George* the Third, intituled, &c., complained, &c.

For that whereas, heretofore, to wit, on the 30th day of *July*, 1835, at a public meeting of the trustees of the said turnpike road, duly held by virtue and authority of the statutes in that case made and provided, at *Dewsbury* in the county of *York*, the tolls of the several gates, chains, and sidebars, erected upon the said turnpike road, were duly put up and let to farm by auction, by virtue of the powers, and in the manner directed by the statutes in that case

signed by the trustees, or their clerk, or treasurer.

2. But it need not set out all the preliminary steps which are required to render a meeting valid for the letting of the tolls; it is sufficient to state that at a public meeting of the trustees, duly held by virtue of the statutes in that case made and provided, the tolls were duly put up and let by auction, by virtue of the powers, and in the manner directed by the statutes.

1. In an action by trustees under 3 Geo. 4, c. 126, s. 57, against the renter of turnpike tolls and his sureties, for rent in arrear, the declaration should shew that the agreement, under which the tolls were let, was in writing, and

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made and provided, and the said *Joshua Crampton* did then and there become and was the last and highest bidder for the said tolls, and was thereupon duly declared the farmer or renter thereof, at the yearly rent or sum of 1630*l.* for three years from the 8th day of *September* then next, and the said *Joshua Crampton* did then and there produce and tender the said *John Crampton* and *Henry Wilkinson* to the said trustees as his sureties for the payment of the said rent; and thereupon, in consideration of the premises, afterwards, to wit, on the same day and year aforesaid, by a certain agreement then and there made by and between the said trustees, (in pursuance of the power and authority given to and vested in them, the said trustees, by the said statutes or some or one of them, and of all other powers and authorities enabling them in that behalf,) and the said defendants, the said trustees, did consent, contract, and agree with the said *Joshua Crampton* to let to him, and the said *Joshua Crampton* did agree to take of and from the said trustees, the said tolls, and all and every the said gates, chains, and sidebars, for the term of three years from the said 8th day of *September*, then next, at the yearly rent of 1630*l.*, payable by twelve equal monthly payments in each year, on the eighth day of each successive month, the first payment thereof to be made on the said 8th day of *September*, then next ensuing; and also under and subject to certain other conditions and stipulations and agreements therein contained. And the said *Joshua Crampton* as farmer or renter of the said tolls, and the said *John Crampton* and *Henry Wilkinson* as his sureties, did thereby jointly and severally promise, undertake, and agree to and with the said trustees, that he, the said *Joshua Crampton*, his executors, or administrators, should and would well and truly pay, or cause to be paid, the said yearly rent or sum of 1630*l.*, at the times in the proportions and in manner thereinbefore limited and appointed for that purpose, and perform, fulfil, and keep, all and singular the conditions, restrictions, and agreements therein contained, and which, on the part of the highest or last bidder, farmer, or renter of the said tolls, were or ought to be performed; and the said plaintiffs say that afterwards, to wit, on the said 8th day of *September*, 1835, aforesaid, the said *Joshua Crampton* entered into and upon, and took possession of, all and singular the toll-houses of and belonging to the said trustees, and then being upon and adjoining the said turnpike road with the appurtenances; and by virtue of the said agreement then and there became and was interested in and entitled to and possessed of the said tolls, and all and every the said gates, chains, and sidebars, belonging to the said turnpike road.

*Breach*—That after the making of the said agreement, and during the said term of three years thereby granted, to wit, on the 8th day of *September*, in the year of our Lord, 1836, a large sum of money, to wit, the sum of 27*l.* 13*s.* 4*d.* of the rent aforesaid, for two monthly payments thereof ending on the day and year last aforesaid, became and was due, and still is in arrear and unpaid by the said *Joshua Crampton*, as farmer or renter of the said tolls, to the said trustees, contrary to the tenor and effect, true intent, and meaning, of the said agreement, so made as aforesaid, of all which several premises the said defendants afterwards, to wit, on the day and year last aforesaid, had notice and were requested to pay the said sum of money so in arrear as aforesaid; yet the said defendants had not paid the same, to the damage of the said trustees of 500*l.*; and therefore the said plaintiff, as such clerk to the said

trustees as aforesaid, and by force of the statute in such case made and provided brought his suit.

*Demurrer*, and the following causes of demurrer were shewn.—That it was not stated in the declaration whether the said trustees caused such notice to be given of the time and place of holding the said meeting, whereat it was alleged the said tolls were put up and let to farm, as was required by the statute, to render the said meeting a legal and valid meeting, for the purpose of letting to farm the said tolls. And also for that the several allegations that the said meeting was duly held, and that the said tolls were duly put up and let to farm by auction, were too general; and that the plaintiff ought to have set forth such facts as would enable the Court to judge whether the said meeting was duly held, and the said tolls duly put up and let, and whether the several directions given by the said statute, touching the holding of meetings for the purpose of letting tolls, and the putting up and letting such tolls, were observed and complied with; upon which facts, some certain and definite issue or issues might be taken to be tried by the country. And also for that it was not stated that the said agreement was signed by the trustees letting the said tolls, or any two or more of them, or by their clerk or treasurer, and by the said defendant *Joshua Crampton* as the lessee and farmer thereof, and the said other defendants as his sureties; or that the said agreement was by deed or under the seals of the said trustees or any of them.

*C. D. Beves*, in support of the demurrer.—The trustees profess to have acted in pursuance of the 55th section of the Turnpike Act, 3 Geo. 4, c. 126. That section requires that the tolls should be let at a public meeting at which certain directions shall be observed (a). Now when a special authority is delegated to particular persons, it ought to be shewn that the authority has been strictly pursued. In this case the act is imperative and not directory, and the distinction between directory and positive statutes is pointed out in *Pearse v.*

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(a) Sect. 55 directs, "That it shall and may be lawful for the trustees or commissioners of every turnpike road, at a public meeting, to let to farm the tolls of the several gates erected upon their respective turnpike roads in the manner hereinafter mentioned, although no express power shall have been given by any act or acts for that purpose, and that whenever any tolls shall hereafter be let to farm by virtue of the powers given by this or any other act or acts of parliament, the following directions shall be observed; that is to say, the trustees or commissioners shall cause notice to be given of the time and place for letting the same, at least one month before the day to be appointed for that purpose, by affixing the same upon every toll-gate belonging to such turnpike road, and also by insertion thereof in some public newspaper circulated in that part of the country, and specifying in every such notice the sum which the said tolls produced in the preceding year clear of the salary for collecting the same, in case any hired collector was appointed, and that they will let such tolls by auction to the best bidder on his producing suffi-

cient sureties for payment of the money monthly or otherwise, (as in such notice shall be specified,) and that they will be put up at the sum which they were let for, or produced in the preceeding year, clear of the salary of the collector; and to prevent fraud or any undue preference to the letting thereof, the trustees or commissioners are hereby required to provide a glass with so much sand in it as will run from one end of it to the other in one minute, which glass, at the time of letting such tolls, shall be set upon a table; and immediately after every bidding the glass shall be turned, and as soon as the sand is run out it shall be turned again, and so for three times unless some other bidding intervenes; and if no other person shall bid until the sand shall have run through the glass three times, the last bidder shall be the farmer or renter of the said tolls, and shall forthwith enter into a proper agreement for the taking thereof, and paying the money at the times specified in such notice, with such surety or sureties for payment thereof, and under such conditions and in such manner as the said trustees or commissioners shall think fit."



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*Morrice (b)* and *The King v. the Mayor of Norwich (c)*. In *Tully v. Sparkes (d)*, it was held to be necessary to shew that there was a petition, and who the petitioners were, and that they were creditors to the amount of the sums required by the Bankrupt Act, 5 Geo. 1, c. 24; and that an allegation that the commission was issued in due form of law was not sufficient. So here it is not enough to state that the tolls were let at a meeting "duly held by virtue and authority of the statutes." [*Tindal*, C. J.—This is a case where the defendants have taken all the benefit of the contract. Many of the directions in the statute are extremely minute. Is it necessary, for instance, to state in the declaration that the glass held so much sand as would have run through in one minute? It seems to me that the general allegation is sufficient.] Then there is another objection, namely that the declaration states that the tolls were duly put up and let to farm, and that an agreement was made by the trustees, in pursuance of the power vested in them by the statute. Now at common law the demise would require to be made under seal; but as no deed is pleaded, the plaintiffs ought to have shewn by what authority the agreement was made. [*Tindal*, C. J.—The statute is a public one, and we are bound to take notice of its provisions. I am not aware of any instance where a party who has had the benefit of a contract could take such an objection.] In *Pearse v. Morrice (b)*, the party for whom the defendant was surety, had taken a benefit under the contract, and it was held that the defendant might take advantage of a similar defect. [*Tindal*, C. J.—There every lease which was not made in pursuance of a local statute was declared to be "null and void to all intents and purposes whatsoever." Here the statute is only directory.] The plaintiff alleges that an agreement was made in pursuance of the statute; but he ought to have shewn how the agreement was made; and cannot be permitted to state the result of the steps which were taken, to comply with the statute. *Lloyd v. Wood (f)*. In general, an allegation that an act has been duly or lawfully performed is not sufficient. *The Abbott of Strata Marcella's case (g)*. *Everard v. Paterson (h)*. *Hodsdon v. Harridge (i)*. The turnpike acts have always received a very strict construction. *Bell v. Nixon (k)*. And at all events the declaration ought to have alleged that the agreement was signed by two of the trustees, or their clerk or treasurer. By the 57th section of the statute, it is provided that all agreements entered into for the letting of the tolls, signed by the trustees or commissioners or any two or more of them only, their clerk or treasurer, and the lessee or farmer and his sureties, shall be good, valid, and effectual, to all intents and purposes whatsoever, notwithstanding the same may not be by deed or under seal, any act to the contrary thereof notwithstanding. Here it is not even alleged that the agreement was in writing.

*Addison, contrà*.—The fallacy in the argument used for the defendants is, that an agreement would be binding upon them, although it might not have been made in pursuance of the 57th section of the statute. If a farmer of tithes has received the benefit of his contract, he will be liable to be sued, although there was no demise of the tithes under seal. [*Tindal*, C. J.—This

(b) 2 Ado. & Ellis, 84.  
(c) 2 B. & Ado. 310.  
(d) 2 Lord Ray. 1546.  
(f) 5 Ado. & Ellis, 228.

(g) 9 Rep. 25.  
(h) 2 Marsh. 304.  
(i) 2 Wms. Saund. 61 h.  
(k) 7 Bingh. 393.

is an action against sureties.] The cases which have been cited are distinguishable from the present. *Pearse v. Morrice* (l), has been distinguished during the argument. Although a lease by husband and wife is required to be by deed "still, however, if the lessee or any other plead a demise by husband and wife, it is not necessary to plead it to be by deed." 2 Wms. Saund. 180 a. *Wiscot's case* (m).

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TINDAL, C. J.—The second point, that the declaration does not allege that the agreement was in writing and signed by the trustees or their clerk, is very strong against you, and you will do well to amend.

Addison assented.

Rule accordingly.

(l) 2 Ado. & Ellis, 84.

(m) 2 Rep. 61 b.

### BUSH v. GREEN.

Nov. 10.

TROVER to recover a gun the property of the plaintiff. *Pleas*—1st, Not Guilty; 2ndly, that the gun was not the property of the plaintiff; and, 3rdly, that on the 24th of November, 1830, one William Jones Burdett was lord of the manor of High Littleton and also lord of the manor of Stowey, in the county of Somerset; and being lord of the said manors the said W. J. Burdett, before the commission of the supposed grievance, to wit, on, &c., according to the form of the statute, &c., by writing under his hand and seal, did nominate and authorize and appoint one William Crossman, therein described as servant of the defendant, to be gamekeeper, of, in, and to, his, the said W. J. Burdett's, said manors, and each of them, with full power, license, and authority, within and upon the said manors, or either of them, to kill any hare, pheasant, partridge, or any other game, whatsoever, for the use and benefit of him the said defendant, and also to take and seize all such guns, bows, greyhounds, setting dogs, lurchers, or other dogs, to kill hares or conies, ferrets, hamels, lowbels, hays, or other nets, hare-pipes, snares, or other engines, for the taking or killing of conies, hares, pheasants, partridges, or other game, as within the precincts of his said manors or either of them, should be used by any person or persons who by law should be prohibited to keep or use the same; which said authority, deputation, and appointment, at the time of the committing of the supposed grievance, was and still is in force and effect, and the same was afterwards, and before the committing of the supposed grievance, to wit, on the 9th of December, 1830, duly entered and registered, with and by the clerk of the peace for the county of Somerset, according to the form of the statute in that case made and provided. That at the time of the using of the said gun, in the declaration mentioned, by one George Keel, as herein-after in this plea mentioned, and also at the time of the seizing, taking, and carrying away the same, as is hereafter also mentioned, the said G. Keel had not any game-certificate authorizing him to kill game, and was by law prohibited from killing game, for want of such certificate; that W. Crossman, so being authorized and deputed, and G. Keel being so unauthorized and

1. A deputation to kill game, granted before the 1 & 2 Wm. 4. c. 32, does not continue in force so as to entitle a gamekeeper in an action for an act done by him after that statute was passed, to have a notice of action, and to give all matters in evidence under the general issue.

2. The 1 & 2 W. 4. c. 32, s. 1, repeals all former game acts, "except as to any matters done by any person, under the authority of the said acts before the 31st Oct., 1831, with respect to which every privilege and protection given by any of the said acts shall continue in force as if this act had not been made." Held, that the granting of a deputation was not a matter done within the meaning of this exception.

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prohibited as aforesaid, because the said *G. Keel* before and at the said time when, &c., within the precincts and limits of the manor of *Stowey*, did use the said gun in the declaration mentioned, for the killing of game within the precinct and limits of the said manor, he, the said *W. Crossman*, being gamekeeper and deputed and authorized as aforesaid, at the same time when, &c., did, by virtue thereof, within the precinct and limits of the manor of *Stowey*, take and seize from the said *G. Keel*, the gun so used by the said *G. Keel* for the killing of game within the precincts and limits of that manor; and did then carry and deliver the same to the defendant, to be by him held and kept, for the use and benefit of the said *W. J. Burdett*, as being such lord of that manor, as it was lawful for him to do, for the cause aforesaid; and that the defendant had from thence, hitherto, as the servant and by the command of the said *W. J. Burdett* in that behalf, kept and detained the said gun, for the use of the said *W. J. Burdett*, as it was lawful for him to do for the cause aforesaid; which were the said supposed grievances and conversion in the declaration mentioned. Conclusion with a verification.

The plaintiff joined issue on the first and second pleas; and after protesting that the authority, deputation, and appointment, at the time of committing the grievances, was not in force or effect, replied *de injuria* to the third plea.

At the trial, before *Williams, J.*, at the last spring assizes for *Somersetshire*, the following appeared to be the facts of the case. The plaintiff proved that a gun belonging to him, was taken away from one *George Keel*, an uncertificated sportsman, by *Crossman*, the defendant's servant, in *November, 1832*. When the seizure was made, *Keel* was within the supposed manor of *Stowey*, with the gun in his pocket, loaded, and under circumstances which might have warranted *Crossman* in supposing that his intention was to kill game. The defendant refused to give up the gun to the plaintiff, contending that his servant had a right to seize it.

On behalf of the defendant it was proved that *Mr. Burdett* had demised his estate at *Stowey* to the defendant; and on the 24th *November, 1830*, had granted a deputation to *Crossman* as gamekeeper, which was enrolled with the clerk of the peace in the same month. For the purpose of shewing that *Stowey* was a manor, some evidence of the exercise of manorial rights, by *Mr. Burdett* was given, as that he had enclosed waste lands, and erected a pound. On behalf of the defendant it was objected that he ought to have received a notice of action, in pursuance of 1 & 2 Wm. 4, c. 32, sec. 47 (a). The plaintiff contended that the defendant was not within the protection of that statute; and that *Stowey* was not a manor, or a reputed manor. The learned judge reserved the point arising on the construction of the statute; and the jury found, 1st, that the gun belonged to the plaintiff; 2ndly, that *Keel* was not using it for the destruction of game; and, 3rdly, that *Stowey* was not a manor. Verdict for the plaintiff.

(a) The 47th section enacts, "That all actions and prosecutions to be commenced against any persons for any thing done in pursuance of the act, shall be commenced within six months, and notice in writing of such action and of the cause thereof shall

be given to the defendant one calendar month at least before the commencement of the action, and the defendant may plead the general issue and give this act and the special matter in evidence."

*Erle*, in *Easter* Term obtained a rule *nisi*, to enter a nonsuit, upon the point reserved at the trial.

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*Bompas*, Serjt., and *Butt*, shewed cause.—The statute which was in force when the gun was seized by the defendant, was the 1 & 2 Wm. 4, c. 32. It is true that by the 47th section, the defendant would have been entitled to notice of action if he had been a regularly appointed gamekeeper, but there are several grounds upon which it may be contended, that he is not within the protection of that statute.

1st point.—The statute came into operation on the 31st October, 1831, and, consequently, after the granting of the deputation in 1830. By the 14th section of the 1 & 2 W. 4, c. 32, a lord of a manor or reputed manor, may appoint and depute any person to be a gamekeeper; and the 16th section provides that no appointment or deputation shall be valid, unless and until, it shall be registered with the clerk of the peace for the county. The defendant ought, therefore, to have obtained a new deputation, and to have registered it with the clerk of the peace, in pursuance of these enactments. The former deputation was no longer in force, because, by the first section of the new statute, all the former statutes, (except as therein excepted,) were repealed. Nor can it be contended that the present case, falls within either of the exceptions (b). It was contended, at the trial, that the granting of the deputation in 1830, was a matter done within the words of this exception, but that construction cannot be adopted. Sections 5, 13, and 41, may be referred to, to shew that a new deputation was contemplated by the legislature, and that the old one was no longer in force. *Surtees v. Ellison* (c). *R. v. M'Kensie* (d).

2nd point.—Another objection is, that even if *Crossman* had a valid deputation, the defendant is not entitled to the protection which a gamekeeper would have, by force of the 47th section of the statute. The deputation was granted to *Crossman*, and although it recited that he was at that time the servant of the defendant, that would not authorize the latter to keep the gun. Nor was it shewn that he was servant to the defendant at the time of the seizure of the gun, but the defendant has acted in the transaction as an entire stranger. *Hopkins v. Crowe* (e). *Irving v. Wilson* (f). Nor is this case within the principle to be found in *Greenway v. Hurd* (g), and *Waterhouse v. Keen* (h).

3rd point.—The next objection is that there was no proof at the trial that *Stowey* was a manor or reputed manor, and the verdict of the jury negatived that it was either the one or the other; therefore there was no right in *Mr. Burdett* to appoint a gamekeeper. The acts of ownership which were relied upon, were quite consistent with the fact that the owner was a freeholder. They did not even prove that *Stowey* was a reputed manor; but as in the plea it is called a manor, it was incumbent on the defendant to shew the existence of a manor. The older game-acts do not give the right to appoint gamekeepers to the lords of reputed manors. In *The Earl of Aylesbury v. Pattison* (i), it was held that the word manor did not include a hundred, or wapentake.

*Erle* contrà.—It is said that although *Crossman* may be within the protec-

(b) See this part of the statute in the judgment.

(c) 9 B. & Cress. 750.

(d) Russ. & Ryan, Cro. C. 429.

(e) 4 Ad. & Ellis, 774.

(f) 4 T. R. 485.

(g) 4 T. R. 553.

(h) 4 B. & Cress. 200.

(i) 1 Doug. 28.

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tion of the new statute, the defendant is not. But throughout the whole transaction, the two persons have been treated as acting together; and in the deputation *Crossman* is described as the servant of the defendant; and it was in evidence that the defendant was the lessee of the manor. Even if he were not strictly within the meaning of the new statute, yet, as he acted *bona fide* under a notion that he was justified in keeping the gun, he is entitled to set up the statute as a justification. *Beechey v. Sides* (k). *Cook v. Leonard* (l).

The existence of the manor is admitted on the pleadings. The plaintiff having protested that the deputation was not in force, at the time of committing of the grievances, thereby admitted the existence of the manor, and that question was not in issue, and the verdict of the jury as to that point, has no operation. And it was not necessary to prove it a manor for all purposes, because there may be a *quondam* manor in existence, when it has ceased to be a legal manor for defect of freehold tenants. *Soane v. Ireland* (m).

Nor is it necessary that the defendant should rely altogether upon the third plea; because if the defendant is within the protection of the statute, he is entitled to give all matters in issue, under the provisions of the 47th section. Then the question is, whether the deputation was in force when the gun was seized. It is clear that there was a good and valid deputation in force before the passing of the 1 & 2 W. 4, c. 32. By the first section all former statutes are repealed with certain exceptions, one of which is, "except as to any matter done by any persons under the authority of any of the said acts, before or upon the 31st day of *October*, 1831." Now the granting of the deputation in 1830, was a matter done, under the authority of the repealed statute; and, therefore, the defendant comes within the provisions of the exception. It could not have been intended that a new deputation should be taken out; if that were so, two deputations would have been required in all cases during the year 1831; one which would be in operation until *October*, and another for the remaining months in the year.

TINDAL, C. J.—This rule must be discharged. The defendant justifies the right to seize the plaintiff's gun, under the statute 1 & 2 W. 4, c. 32. By sec. 13 it is enacted, that it shall be lawful for the lord of any manor, or reputed manor, by writing under hand and seal, "to appoint one or more person or persons as a gamekeeper or gamekeepers, to preserve or kill the game, within the limits of such manor or reputed manor, for the use of such lord or steward thereof, and to authorize such gamekeeper or gamekeepers, within the said limits, to seize and take, for the use of such lord or steward, all dogs, nets, and other engines and instruments for the killing or taking of game, as shall be used within the said limits, by any person not authorized to kill game for want of a game-certificate." The question is, whether the defendant has brought himself within the privileges granted by this statute, so as to entitle him to give matters in evidence, under the general issue, and to have notice of action? It is clear that, under the special plea, the defendant is out of court, and he must, therefore, rely upon the general issue; and it becomes one and the same proposition, whether he can avail himself of the general issue, and also require notice of action. It is clear that, under the 22 and 23 Car. 2, c. 25, he would not be entitled to either of these privileges, and he must,

(k) 9 B. & Cress. 806.

(l) 6 B. & Cress. 351.

(m) 10 East, 259.

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therefore, bring himself within the provisions of the new statute. Now it appears to me that the defendant was not a gamekeeper, appointed or deputed under the provisions of the new statute. The words of the sixteenth section are extremely strong and significant. It is enacted, that no appointment or deputation of any person as gamekeeper, by virtue of that act, shall be valid, unless and until it shall be registered with the clerk of the peace. It was expressly found, at the trial, that the deputation was given under the old act; and that it was registered in *November*, 1830, which was before the new act came into operation. It cannot, therefore, be said, that the defendant was a gamekeeper, appointed or deputed by virtue of the new act. Then it is said that there are words used in the first section, which do virtually continue the deputations under the old act; but the defendant is bound to go further, and to shew that he is entitled to all the benefits conferred by the new act; let us therefore see, if the words are sufficient to support this view of the case. By the new act, all the former statutes are repealed, with certain exceptions; they are three in number: first, "except so far as any of the said acts may repeal the whole or any part of any other acts;" secondly, "and except as to any offences which may have been committed against any of the said acts, before or upon the said 31st day, and as to any penalties which may have been incurred thereunder, before or upon the said 31st day, which offences shall be dealt with and punished, and the penalties recovered, as if this act had not been made." Then comes the third exception, upon which the defendant relies, "and except as to any matters done by any person under the authority of any of the said acts, before or upon the said 31st day, with respect to whom every privilege and protection given by any of the said acts, shall continue in force, as if this act had not been made." These words import that the privileges and protection given by the former statutes, shall continue until the 31st of *October*, 1831, and it is contended that this includes the deputation. But it is to be observed that the persons of whom the legislature is speaking, are gamekeepers, acting under a deputation, and that limits the clause, and it cannot be extended to lords of the manor, who grant the deputation. It appears, therefore, to me, that as the defendant has not brought himself within the exception, he is not entitled, on that ground, to enter a nonsuit, and this rule must be discharged.

VAUGHAN, J.—No reasonable doubt can be entertained about this case. The plaintiff proved all that was necessary to support an action of trover. The question is whether, under the provisions of the 1 & 2 W. 4, c. 32, the old deputation was continued, as if it had been a new one. It has been contended that if this is not so, great inconvenience would follow, but if the words are plain, that argument ought not to prevail. The first section contains three exceptions, but I cannot consider that the construction contended for is in any manner applicable. In every view of the case the verdict is right.

BOSANQUET, J.—The first point which the defendant is bound to maintain is, that there was a valid deputation, and it must have been a deputation which was valid, prior to the 1 & 2 W. 4, c. 32. Previous to that time, certain rights are conferred on lords of manors, and by the special plea, the deputation is stated to have been given by the lord of the manor of *Stowey*, and upon that question an issue was raised. But it appears, by the finding of the

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jury, that there was no manor in existence, and, if that be so, there was no valid deputation which could be continued. It might be unnecessary, therefore, to inquire whether the deputation was continued; but, for the reasons which have been given by my lord chief justice, which I do not think it necessary to repeat, I am of opinion that the deputation was not continued by the new act. By the exception in the new act, for matters done prior to the 31st of *October*, 1831, the same privilege and protection is given; but I think the word "matters" means things done which would make the party liable to penalties or other proceedings; and in such cases they have the same privilege and protection as they had before. Then it is said, that if the deputation is continued by the 1 & 2 W. 4, c. 32, then that an act done subsequently, would be entitled to protection; but even if that were so, the privilege and protection would only be the same as it was previously, and that did not include the privilege of pleading the general issue, and of receiving a notice of action.

COLTMAN, J.—I see no ground for disturbing this verdict. The third plea is out of the question, by the finding of the jury; but it is open for the defendant to ask for a nonsuit, on the ground that he was entitled to give the whole defence in evidence, under the general issue, and that no notice of action was given by the plaintiff: that depends upon the effect which is to be given to the exceptions in the first section of the 1 & 2 W. 4, c. 32. All former acts are repealed, with certain exceptions, and it is material to consider for what purposes the exceptions are introduced. The exceptions are, first, of former repeals; secondly, of offences committed before the 31st of *October*, which would otherwise have remained unpunished; and, thirdly, of matters done under the authority of former acts. The latter provision seems to have been inserted for the protection of persons who might otherwise have been liable to actions; such an exception might have been unnecessary for this purpose, but I see no reason for extending it beyond that. Upon the principle, therefore, that the new act repeals all former acts, and that the defendant is not brought within the exception, I agree that this rule must be discharged.

Rule discharged.

Nov. 15. MORLEY, administrator of JOHN CUMBERLEGE deceased v.  
 INGLIS and others.

In an action of  
 assumpsit for  
 money lent, the  
 defendants  
 pleaded, as a  
 set-off, that by  
 a memorandum  
 in writing the  
 plaintiff guar-  
 anteed to pay the  
 defendant 1600*l.*,  
 money lent, and  
 any further sums  
 which they might  
 advance to J. C.;  
 and that, at the  
 time of the suit,  
 the plaintiff was  
 indebted to the  
 defendants on  
 the said guarantee,  
 the said sum of  
 1600*l.*, and a fur-  
 ther sum of 3000*l.*,  
 afterwards lent to  
 J. C. Held, that  
 this was not a  
 debt which could  
 be set-off against  
 the plaintiff's  
 demand, within  
 2 Geo. 2, c. 22,  
 sec. 13.

ASSUMPSIT.—The declaration stated that the defendants on, &c., were indebted to *John Cumberlege* in his lifetime in 10,000*l.* for money received by the defendants for the use of the said *John Cumberlege*; and in 10,000*l.* for money found to be due from the defendants to the said *John Cumberlege*, on an account then stated between them.

plaintiff guaranteed to pay the defendant 1600*l.*, money lent, and any further sums which they might advance to J. C.; and that, at the time of the suit, the plaintiff was indebted to the defendants on the said guarantee, the said sum of 1600*l.*, and a further sum of 3000*l.*, afterwards lent to J. C. Held, that this was not a debt which could be set-off against the plaintiff's demand, within 2 Geo. 2, c. 22, sec. 13.

*Breach*—Non-payment to the said *John Cumberlege*, or to the plaintiff, as his administrator, since his decease. A similar count for money due to the plaintiff as administrator.

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*Plea*—The defendants say that heretofore, and in the lifetime of the said *John Cumberlege* deceased, to wit, on the 29th day of *September*, A.D., 1831, in consideration that the defendants, at the request of the said *John Cumberlege*, since deceased, had agreed to lend and advance to *John Cumberlege* the younger, the son of the said *John Cumberlege* deceased, the sum of 1600*l.*, and would, with the assent of the said *John Cumberlege*, hold the said sum at the disposal, and place the same to the credit, in account of the said *John Cumberlege* deceased; and also in consideration that the said defendants, at the request of the said *John Cumberlege* deceased, would advance to or for or on the account of the said *John Cumberlege* the younger, such further sums as he might require of the defendant in that behalf, the said *John Cumberlege* deceased, by a certain memorandum in writing, then signed by him, guaranteed and agreed with the defendants to be answerable to them for the repayment of the said sum of 1600*l.*; and also any further sums which might then, to wit, on the day and year last aforesaid, or thereafter be owing to them from the said *John Cumberlege* the younger. And the defendants aver that they, confiding in the said promise and undertaking of the said *John Cumberlege* deceased, did afterwards, to wit, on the day and year last aforesaid, with the assent of the said *John Cumberlege* the younger, hold the said sum of 1600*l.* agreed to be lent, and which was then lent to him, by the defendants, on the terms aforesaid, at the disposal of, and place the same to the credit in account of the said *John Cumberlege* deceased, and did accordingly then apply and advance and pay the same upon the terms aforesaid; and relying on the said guarantee, did afterwards, in the lifetime of the said *John Cumberlege* deceased, to wit, on the 1st day of *October*, 1831, advance and pay to and for and on the account of the said *John Cumberlege* the younger, divers other monies, to wit to the amount of 3000*l.*; and although the times for the repayment of the said sums of 1600*l.* and 3000*l.* to the defendants elapsed before the commencement of this suit, and although the said *John Cumberlege* the younger was afterwards, to wit, on, &c., requested by the defendants to pay them the said sums of 1600*l.* and 3000*l.*, yet he hath not paid the same, or any part thereof, to the defendants or either of them; of all which premises the said *John Cumberlege* deceased, afterwards, to wit, on, &c., had notice, and was then requested by the defendants to pay them the said sums of 1600*l.* and 3000*l.*; yet the said *John Cumberlege* deceased, in his lifetime did not pay, nor hath the plaintiff, as administrator as aforesaid, since the death of the said *John Cumberlege* deceased, paid the said sums of 1600*l.* and 3000*l.*, or either of them, or any part thereof, to the defendants, or either of them, and the same still remains due, in arrear, and unpaid; and the plaintiff, as administrator as aforesaid, before and at the time of the commencement of this suit was, and still is, indebted to the defendants in the said sums of 1600*l.* and 3000*l.*, upon and by virtue of the said guarantee; which said several sums of money in this plea mentioned, so due to the defendant, exceed the damages sustained by the plaintiff, as administrator as aforesaid, by reason of the non-performance by the defendants, of the said several promises in the said first and second counts mentioned, and out of which said sums of money so due to defendants, they, the defendants, are ready and willing, and hereby offer to set off and allow to the plaintiff, as ad-



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ministrator as aforesaid, the full amount of the said damages, according to the form of the statute in such case made and provided.

*Demurrer*—And as to so much of the said second plea as relates to the above guarantee, and the monies therein alleged to be due to the defendants, upon and by virtue of the said guarantee, the plaintiff saith that it is not sufficient in law, and shews the following causes of demurrer :—that money claimed to be due upon such a guarantee is not the subject-matter of set-off, and that the averment at the conclusion of the said part of the said second plea, that the plaintiff, as administrator, was and is indebted to the defendant by virtue of the said guarantee, if meant to be a conclusion of law upon the facts previously stated, is not a true or correct legal conclusion; or if meant as a distinct allegation of a matter of fact, is not sufficiently certain, and does not show, as it ought to do, how and in what manner the plaintiff became so indebted; whether upon an account stated, or by contract, or otherwise; and also for that the said plea is in other respects uncertain, informal, and insufficient.

*Joinder in demurrer.*

*Martin*, in support of the demurrer.—The question is, whether a liability on a guarantee is the subject of a set-off. It would not be so at common law, that is quite clear; therefore the defendant must rely upon the statute 2 Geo. 2, c. 22, which gives the right of set-off. Sec. 13 of that stat. enacts, that where there are *mutual debts* between the plaintiff and defendant, one *debt* may be set against the other; but a liability on a guarantee is not a debt within the meaning of this statute. The debts must be mutual. Now in 1 Rolle's Abr. page 594, pl. 2, it is said, that if the plaintiff declares that the defendant was indebted to him in 20*l.*, for goods sold to a third person, at the request of the defendant, and for which the defendant promised to pay, that is not a good consideration, because no action of debt would lie, but only an action on the case upon the promise. The same rule is laid down in other authorities, 1 Wms. Saund. 211, b. *Butcher v. Andrews* (a). *Marriott v. Lister* (b). *Mines v. Sculthorpe* (c). And, down to the present time, the rule is well established, that upon a liability on a guarantee, an action of debt is not maintainable. Nor can any precedent be found, of a plea of set-off, arising on a guarantee, in any of the books on pleading. There are several authorities directly in point. In *Crawford v. Stirling* (d) the amount of a guarantee, given by the plaintiff, on account of one *Kirkpatrick*, was made the subject of a set-off, and it appeared that the plaintiff and defendant had settled an account, in which it was agreed that a certain sum should be taken as the amount of the guarantee; but Lord *Ellenborough*, C. J., said "that there was no foundation for the set-off claimed, as the sum claimed was unliquidated damages: that a guarantee was a contract of indemnity: it was to make good the default of another party, for whom the guarantee was given: that it was not an absolute debt by the plaintiff to the defendant, but an engagement for the deficiency of *Kirkpatrick* only: it could, therefore, only be known to what extent the plaintiff was liable, when it was ascertained how much was paid by *Kirkpatrick's* estate: this was, therefore, uncertain and unliquidated till that fact was known. With respect to the settlement of accounts, in which a certain sum had been put on

(a) 1 Salk. 23,  
 (b) 2 Wils. 141.

(c) 2 Campb. 214.  
 (d) 4 Esp. 206.

one side of the account, on account of the guarantee, that was only stated as the amount of the guarantee and the palpable amount in the account, but it was still liable to be altered by the dividend made by *Kirkpatrick*, in diminution of the debt due by him to the defendant. To make the sum admissible as a set-off, the sum must be settled in monies numbered." That case is in all respects like the present, and the reasoning of Lord *Ellenborough* is unanswerable. *Howlett v. Strickland* (e). Comyn's Dig. tit. Debt. *Weigall v. Waters* (f). *Colson v. Welsh* (g). *Hutchinson v. Reid* (h). *Hardcastle v. Netherwood* (i). *Cooper v. Robinson* (k). *Grant v. Royal Exchange Company* (l). It may be said, on the other side, that in *Cope v. Joseph* (m) and *Collins v. Wallis* (n), defendants have been held to bail for money due upon contracts of indemnity; but in all cases where the arrest is not founded upon a debt, a special order is obtained from a judge. Before arrests were allowed for debt, defendants might have been arrested for injuries accompanied with violence, as in the case of forcible entries. 3 Black. Comm. 281.

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Sir W. W. Follett, *contrà*.—The set-off relates to two different species of sums: one a sum of 1600*l.*, which the defendants agreed to advance to *Cumberlege* the younger, and which was to be placed to credit in the intestate's account: the other a sum of 3000*l.* advanced to *Cumberlege* the younger, on the guarantee of the intestate. The words of the 13th sec. of 2 Geo. 2, c. 22, must be taken in their usual and ordinary sense, and whenever a sum certain, is due from the defendant to the plaintiff, it is a debt within the meaning of the statute. It may be conceded that whenever the claim is for unliquidated damages which must be assessed by a jury, it is not the subject of a set-off; and, therefore, it has been properly held that damages arising from a breach of covenant in a lease, cannot be set off in an action of covenant for rent, because the set-off sounds in damages. This observation disposes of *Weigall v. Waters* (o) and that class of cases which has been referred to on the other side. It is said that an action of debt will not lie upon a guarantee, and it is thence inferred that it cannot be made the subject of a set-off: but that is not the true criterion, for there are many cases where debt would not lie, and nevertheless the demand could be set off. Com. Dig. tit. Debt, (A. 8.) where it is said—"If one promises A. to pay him 10*s.* per week, if he will serve his aunt, debt does not lie, for the service was not to himself, and so there wants a *quid pro quo*." Many other similar illustrations are to be found in Comyns. So debt will not lie by an indorsee against the acceptor of a bill of exchange, *Clowes v. Williams* (p); and yet such a debt is by every day's practice made the subject of a set-off. Debt will lie by the drawer against the acceptor of a bill of exchange, *Pridgy v. Hembrey* (q), and that is in like manner the subject of a set-off. The question is, what is the meaning of the word "*debt*?" It means a sum certain, which is owing by one party to the other; and the cases only go to shew, that whenever the intervention of a jury to assess damages is required, the claim cannot be set off. It has been held, under the Bankrupt Acts, 5 Geo. 2, c. 30, sec. 28, and 6 Geo. 4. c. 16, sec. 50, that to entitle a defendant, to his right of set-off, it is sufficient if the demand is of

(e) Cowp. 56.  
(f) 6 T. R. 498.  
(g) 1 Esp. 379.  
(h) 3 Camp. 329.  
(i) 5 B. & Ald. 93.  
(k) 2 Chit. 161.

(l) 5 M. & Sel. 439.  
(m) 9 Price, 155.  
(n) 11 Moore, 248.  
(o) 6 T. R. 488.  
(p) 3 Bing. N. C. 865; ante, 176.  
(q) 1 B. & Cress. 674.

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such a nature as would end in a debt. *Cornforth v. Rivatt* (r). *Rose v. Sims* (s). *Rose v. Hart* (t). *Hawkins v. Whitten* (u). *Dickson v. Cass* (x). The question is not, therefore, whether an action of debt could be maintained upon this guarantee, but whether it is a debt which may be set off. The dictum of *Ashhurst, J.*, in *Howlett v. Strickland* (y), that debts to be set off must be such as an *indebitatus assumpsit* will lie for, is clearly incorrect, otherwise no specialty debt could be pleaded by way of set-off. In *Thorpe v. Thorpe* (z), where A. remitted a bill of exchange to B., to be paid to a third person on A.'s account, and B. did not pay over the proceeds, upon which A. brought an action of assumpsit for money had and received, it was held that a set-off was admissible; although it was admitted that if the plaintiff had chosen to bring an action on the case, for the breach of duty, there could have been no set-off. The same principle is applicable here, the defendant may abandon any right which he may have to recover damages, and set off the actual amount of the money advanced on the guarantee. The principal authority on the other side is *Crawford v. Stirling* (a), but the reasoning of Lord *Ellenborough* is not satisfactory. By the law of this country a party who receives a guarantee is not required to take any steps against the principal debtor; but Lord *Ellenborough's* observations are rather applicable to the state of the law in other countries, where it is first necessary to exhaust the property of the principal debtor. Nor does it appear, in the report of that case, whether the time for payment by the principal debtor had expired; it would rather seem that it had not. In the present case the defendants were not bound to take any proceedings against *Cumberlege* the younger, and therefore, the amount of the debt being ascertained and defined, there can be no good reason for holding that it cannot be set off. Whenever damages are liquidated, they may be set off. *Fletcher v. Dyche* (b) and *Lowe v. Peers* (c). In *Cope v. Joseph* (d) it was held that a defendant may be held to bail upon a guarantee, on the ground that an action of debt would lie. The same principle is to be found in *Collins v. Wallis* (e).

*Martin*, in reply.—The cases which have been last referred to, do not affect the present question, because it is the usual practice to allow defendants to be held to bail, in actions of trover and other similar cases. It is a strong fact that no authority can be produced, where a liability on a guarantee has been allowed to be set off. The reason is, that the damages are uncertain, and the intervention of a jury is requisite to determine the amount of the liability. The question of damages is entirely with the jury; they may give less than the amount which is claimed, if the circumstances of the case warrant them in doing so. For instance, if the principal debtor were a perfectly responsible man, the jury may take that into account. [*Tindal, C. J.*—I know of no case where money is to be paid on a day certain, that, upon an action being brought against the surety, the Court have inquired into the solvency of the principal debtor.] Many of the cases which have been referred to, arise on debts due on bonds and other specialties, but here the damages arise on a simple con-

(r) 2 M. & Sel. 510.  
 (s) 1 B. & Ado. 521.  
 (t) 8 Taunt. 499.  
 (u) 10 B. & Cress. 217.  
 (x) 1 B. & Ado. 343.  
 (y) Cowp. 56.

(z) 3 B. & Ado. 580.  
 (a) 4 Esp. 206.  
 (b) 2 T. R. 32.  
 (c) 4 Burr. 2225.  
 (d) 9 Price, 155.  
 (e) 11 Moore, 248.

tract, and they are unliquidated. *Crawford v. Stirling* (f) and *Hardcastle v. Netherwood* (g) are decisive authorities to shew that this plea cannot be supported. The cases arising on the Bankrupt Acts are distinguishable, because the words "mutual credits" and "debts and demands" are there to be found. It is true that, in some cases, the amount of bills of exchange has been allowed to be set off, although no action of debt would lie, and it is not easy to find the origin of this practice. But the cases are very different, because a liability on a bill of exchange is not a contract of indemnity, like a guarantee.

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TINDAL, C. J.—It appears to me, that this plea of set-off cannot be supported. The question depends upon a statutory law. The 2 Geo. 2, c. 22, sec. 13, enacts—"That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued, as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require." I shall not undertake to say that the word "debt" must be construed in the strict sense, which was necessary for the maintenance of the old action of debt, nor shall I go through the bead-roll of cases which has been cited upon that point. If the demand sought to be set off, sounds in damages, the proper mode of deciding the question is to ascertain whether the damages have been, or may be, liquidated or ascertained with precision, at the time of pleading. The present case falls within neither of these alternatives. The intestate had given the defendants a guarantee for the repayment of 1,600*l.*, and any further sums which might thereafter be owing to them from *J. Cumberlege* the younger. Now there being no time fixed for the payment of the money due on this guarantee, the law would imply that it was payable on demand; and accordingly the declaration contains an averment that a demand of 1,600*l.* and 3,000*l.* was made, and the plea then proceeds to state that "the same still remained due, in arrear, and unpaid, and the plaintiff as administrator as aforesaid, before and at the time of the commencement of this suit, was still indebted to the defendants in the said sums of 1,600*l.* and 3,000*l.* upon and by virtue of the said guarantee." But that is not a legal deduction. The guarantee was given for the payment of an uncertain sum of money at a certain time, and the intestate would not only be answerable for the sum lent, but also for any damages which would be immediately consequential upon the breach of the undertaking; one species of such damages would be the interest on the sum due, and others may be suggested. It is clear, and it seems to have been admitted during the argument, that *indebitatus assumpsit* could not have been maintained on this guarantee against the intestate. Suppose the parties were reversed, and that the defendants were suing the plaintiff on the guarantee, could it be contended that the plaintiff might set off the debt which he now seeks to recover? All the cases, and particularly *Crawford v. Stirling* (f), which I am unable to say is not rightly decided, clearly shew that he could not. What, then, is to prevent the defendants from suing on the guarantee in one action, and at the same time setting off the demand as an answer to another action? Is that to depend upon their treating it as a demand for unliquidated damages in the one case, and calling it a debt in

(f) 4 Esp. 206.

(g) 5 B. & Ald. 93.

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the other? It, therefore, does not appear to me in this case that the damages are liquidated or ascertained. *Thorpe v. Thorpe* (f) is a case where the plaintiff waived his right to any damages, and sued upon the contract, and it was held that he had a right to make his election. *Fletcher v. Dyche* (g) was a case where the damages were clearly liquidated and ascertained. *Cope v. Joseph* (h) and *Collins v. Wallis* (i) did not depend upon any question of set-off, but merely upon the discretion of the Court to allow parties to be held to bail, and those cases are not of sufficient weight to counteract the principle upon which we are now proceeding. Seeing, therefore, that *Crawford v. Stirling* (k) has remained so long undisturbed, I am not disposed to interrupt its repose now; and think that our judgment ought to be for the plaintiff.

VAUGHAN, J.—It was admitted, during the argument, that if this is a demand for unliquidated damages, it could not be set off against the plaintiff's debt; but it has been contended that the defendants may elect to receive the principal sum due from the original debtor, and waive all damages. It seems to me, however, that a guarantee is a contract peculiarly sounding in damages, and in the absence of all authority in support of this plea, I agree that our judgment must be for the plaintiff.

BOSANQUET, J.—I am also of opinion that the demands in the declaration and the plea are not mutual debts within the statute 2 Geo. 2, c. 22, sec. 13. It is clear that the intestate's undertaking to pay the money advanced to *J. Cumberlege* the younger, must have been in writing, and no liability would have accrued, until default was made in payment by the original debtor. It was not, therefore, *debitum in presenti solvendum in futuro*. It being, therefore, a mere collateral engagement to pay the debt of another, it could only be made the subject of a suit for unliquidated damages. No precedent has been referred to, to shew that such a plea has been allowed, and there is a very direct authority, *Crawford v. Stirling* (k), in which Lord *Ellenborough* held that such a demand was not the subject of a set-off.

COLTMAN, J.—I have always understood that such a demand as the present could not be made the subject of a set-off; and I look upon *Crawford v. Stirling* (k) as shewing what the impression of the profession was, at the time it was decided, and there have been no subsequent decisions contrary to it.

Judgment for the plaintiff.

(f) 3 B. & Ado. 580.  
 (g) 2 T. R. 32.  
 (h) 9 Price, 155.

(i) 11 Moore, 248.  
 (k) 4 Esp. 206.

## CROOME v. GUISE.

Nov. 25.

**T**ROVER for the conversion of a horse. The defendant pleaded that the plaintiff was not possessed of the said horse as of his own property, on which plea issue was joined.

By consent of the parties and by the order of a judge, the following case was submitted for the opinion of the Court:—

The manor of *Painswick*, in the county of *Gloucester*, is an ancient manor, the lords of which have, from time immemorial, enjoyed the right of taking certain fines and heriots from the tenants of the manor, according to the custom of the manor, as thereafter set forth, and the customary and copyhold messuages and hereditaments, parcel of the said manor, have been from time immemorial, used and accustomed to be granted and demised by copy of court roll of the said manor, for estates of inheritance in fee simple, by the words *sibi* and *suis*, at the will of the lord, according to the custom of the manor.

In the 28th year of the reign of Queen *Elizabeth*, some difficulties having arisen between the then lord of the said manor and his tenants, touching the customs of the manor, those customs were declared and explained in and by a decree in a certain chancery suit, a copy of which decree was to be taken as part of this case. The customs set out in this decree were afterwards ratified and confirmed by an act of parliament, passed for that purpose in the 21st *James* 1, which statute is also to be taken as part of this case.

The 6th, 7th, 13th, 16th, and 17th of these customs, are to the following effect:—

6. "The tenants by their custome tyme out of minde used, may geve and sell their customary lands att their will and pleasure, making a surrender of the same either in the open court to the hands of the steward for the tyme being, or else out of court into the hands of the reeve of that yere, or his deputie, in the psence of two customarie tenants of the same mannor, and the same surrender must be psented att the next court, or else the surrender to be void, and upon every surrender so made and psented in court, the lord is to have an herriott if the land be herriottable, that is to saye, for every yard and halfe yard of land which the tenants hold, to geve or paye the best quicke cattle, and in default of such cattle the best household stuffe or goods of what kinde soever."

7. "That upon every discent of anie customary lands of inheritance, the lord is to have one year's rent for his fine and herriott in manner aforesaid if the land be herriottable."

13. By this custom tenants were allowed to demise their lands without a license from the lord.

16. "By the custome every yarde or halfe yard of land holden by coppie after the custome and manner, is herriottable, and the heriot to be paid att the death of the tenante that dyeth seized thereof or upon the surrender of his possession when the reversion was surrendered before."

17. "If any customary tenante shall lett or sell his yarde or halfe yarde of landes which is herriottable, and att his decease the lord not answered the best

By a custom in the manor of *P.* upon every descent, the lord was to have for an heriot, the best quick cattle of the tenant, and in default of such cattle, the best household stuff or goods. By another custom, if any customary tenant should let his land, "and at his death the lord has not been answered the best beast for his heriot which did commonly manure the premises for one year before his decease," then the lord was to be paid 40s. instead of a heriot. *Held*, that where a customary tenant had let his land and afterwards died, the lord could not seize the best beast for his heriot, but that he was bound to take the 40s. in lieu thereof.

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beast for his heriott, which did commonly manure the said premises by the space of one year next before his decease, or the full value thereof, that then such person to whom the same yarde or halfe yarde by the custome ought to come, shall pay to the lord or his officers, within six weeks next after the death of such tenant, three pounds for every yarde lande, and forty shillings for every halfe yarde, instead of an herriott, and in case defaulte be made thereof, then it shall be lawfull for the lord, by his officers, to take one whole year's profits of such yarde or halfe yarde, to his owne use and behoofe instead of the said herriott."

In *February*, 1804, the plaintiff purchased the said manor of *Painswick* and became and still is the lord of the said manor and seised in his demesne as of fee thereof. On the 21st of *July*, 1823, Sir *Berkeley William Guise*, Bart., was admitted tenant to a half yarde land, heriotable, parcel of the customary tenements of the said manor, called the *Quarr*, within the said manor, and held at the yearly rent of 1*l.* 7*s.* 4*d.*, and a heriot, according to the custom of the manor, on descent and alienation when it should happen; and the said Sir *B. W. Guise*, continued until the time of his decease seised of the said tenement in his demesne as of fee, at the will of the lord, according to the custom of the manor. Sir *B. W. Guise*, afterwards, in 1830, demised the last mentioned tenements, from year to year, to *John Bailey*, to hold as such tenant thereof, under the said Sir *B. W. Guise*, and *J. Bailey* became tenant, and his tenancy under the said Sir *B. W. Guise* continued until the decease of the latter, who died 23rd of *July*, 1834, having by his will appointed the defendant his executor. The copyhold tenement descended to the heir at law of Sir *B. W. Guise*. Upon the death of Sir *B. W. Guise*, the plaintiff claimed the best quick beast of the said Sir *B. W. Guise* at the time of his death, as a heriot due on the descent of the said copyhold tenement, and in prosecution of such claim, and within the space of ten days after the death of Sir *B. W. Guise*, the plaintiff seized a certain horse of the value of 50*l.*, being the horse in the declaration mentioned, being the best quick beast of Sir *B. W. Guise*, such horse not having commonly manured the said premises by the space of one year next before his decease; whereupon the defendant, claiming the said horse as part of the personal estate of the said Sir *B. W. Guise*, deceased, retook the said horse from the plaintiff, and converted the same to his own use. The defendant, after seizure of the said horse by the plaintiff, and within six weeks next after the death of Sir *B. W. Guise*, tendered to the plaintiff the sum of 2*l.* for the said half yarde of land, instead of an heriot, but the plaintiff refused to accept the same.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in this action? If the Court should be of opinion that the plaintiff was so entitled, judgment was to be entered for the plaintiff by confession for 50*l.* damages; but if the Court should be of opinion that the plaintiff was not entitled to recover, judgment of *nolle prosequi* was to be entered for the defendant.

*R. V. Richards*, for the plaintiff.—The lord of the manor is entitled to recover this horse under the general law; and by virtue of the sixth and seventh customs of the manor. When a heriot is due, the property in the beast is in the lord immediately on the death of the tenant: and the lord cannot take any chattel but one which belongs to the tenant. 1 Scriv. on Copyholds.

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440, 2nd ed. *Parton v. Mason(a)*. By the sixth custom the heriot is described as being the best quicke cattle, and in default of such cattle, the best household stuff or goods of the tenant. Then the seventh custom is, that upon every descent, the lord is to have one year's rent for his fine, and heriot in manner aforesaid, if the land be heriotable. Here the lord has exercised his right by making the seizure, and it is incumbent on the defendant to shew why that right cannot be exercised. It will be said that the seventeenth custom prevents the lord from demanding the best beast, and that the tenant was entitled to pay the sum of two pounds for the half yard of land; but that custom would only come into operation where the lord "is not answered the best beast for his heriot, which did commonly manure the premises." There was, therefore, an option reserved to the lord, and the seventeenth custom was not intended to deprive the lord of his heriot according to the seventh custom; but must be construed as giving him a cumulative remedy, in cases where the customary tenant had let his land, as he was allowed to do by the thirteenth custom. But the personal estate of the tenant, is not in any manner exonerated from the primary liability to satisfy the lord of his heriot.

*Stephen, Serjt., contrd.*—The defendant having tendered to the plaintiff the sum of two pounds, within six weeks from the death of the tenant, in respect of the land which had been demised, the plaintiff was not entitled to claim the horse as an heriot. The seventeenth custom is precisely applicable to this case. Nor was the plaintiff entitled to seize this beast, because it had not commonly manured the premises demised, for one year before the tenant's decease. The case of *Parton v. Mason(a)* merely shews that a custom to take the goods of a stranger as a heriot, is not good. In *Garland v. Jekyll(c)* heriots are said to be a species of tribute, which the tenant offered to the lord, when he prayed the lord to confer on him the interest which had been determined by the decease of his former tenant.

The custom set out in the seventeenth section was intended as a commutation for the heriot: for half a yard of land consists of about ten acres, and two pounds was about the value of a good beast at the time the award was made. The lord was entitled to seize the best beast which manured the ground, and if there was no such beast to seize, the lord was to be entitled to the payment of two pounds. If there is any doubt as to the compensation which the lord is entitled to receive, then as customs are construed strictly, the judgment of the Court ought to be in favour of the defendant. Year Book, 5 Hen. 7, 41. In *Arthur v. Bokenham(d)*, it is said upon this subject, "All customs which are against the common law of England ought to be taken strictly, nay very strictly, even stricter than any act of parliament that alters the common law. It is a general rule that customs are not to be enlarged beyond the usage, because it is the usage and practice that makes the law in such cases, and not the reason of the thing; for it cannot be said that a custom is founded on reason, though an unreasonable custom is void, for no reason, even the highest, whatsoever, would make a custom a law; so it is no particular reason that makes any custom, law, but the usage and practice itself, without regard had to any reason of such usage, and therefore you cannot enlarge

(a) Dyer, 199 b.  
(c) 2 Bing. 293.

(d) 11 Mod. 160.



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such custom by any parity of reason, since reason has no part in the making of such custom."

Nor will equity interfere in favour of heriots. 2 Eq. Ca. Abr. 279. It appears that there is no novelty in a custom which gives the lord the sum of forty shillings in lieu of a heriot. Viner's Abr. tit. Heriot, G. 12. *Hanson v. Carve*(e). Or in requiring that the beast should be levant and couchant upon the land. Fitz. Abr. tit. Hariott, 6. *Parton v. Mason*(f). The case of underletting was expressly provided for by the seventeenth section, and the lord is bound by that provision. As the custom there set forth, comes subsequently to the sixth custom, it ought to prevail. Thus in *Paget v. Foley*(g), where two affirmative enactments were inconsistent, it was held that the provisions of the latter, *pro tanto*, repealed the former. Hardress, 344.

*R. V. Richards*, in reply.—The lord has not seized under the provisions of the seventeenth section, but under the custom set out in the sixth and seventh sections. Therefore the argument, that the beast had not been manuring the premises, is not applicable. It is not necessary for the plaintiff to shew what the meaning of the seventeenth section is, because it does not apply to the present case. As to the origin of heriots, the better opinion is that they were originally tributes made to the lord, of the best horse and armour of the deceased tenant, in order that they might continue to be used for the purposes of national defence. There is no privity between the lord, and the occupier of the land, and the lord could not seize the beast of a stranger: 2 Wms. Samd. 168 a., therefore the heriot must in all cases be paid by the tenant. It is said that the lord ought to seize a beast which has manured the land for one year, but cattle do not stay on any premises during the whole of a year. In *Parkin v. Radcliffe*(g), it was decided that a plea which set out a custom that the homage should assess a compensation in lieu of a heriot could not be maintained.

Cur. adv. vult.

TINDAL, C. J.—The question raised by this special case is, whether the plaintiff, as lord of the manor of *Painswick*, was justified in seizing the horse which is the subject-matter of this action, as a customary heriot due upon the death of the late Sir *Berkeley William Guise*, a customary tenant of the said manor? And the answer to this question appears to us to depend not so much upon any discussion of the general law relating to heriots, as upon the proper construction to be put upon the customs of this particular manor. The customs are set forth in the decree of the Court of Chancery, which forms part of this case, and which were afterwards confirmed by a private act of parliament, passed in the 21st year of King James I.

Such of the customs of the manor as claim our particular attention, are the customs contained in the 6th, 7th, 16th, and 17th articles of the indenture set forth in the decree. It appears, by articles 6 and 7, that a heriot is due by custom to the lord, upon every surrender and every descent of all customary tenements of the manor, that are heriotable, and that such heriot is "the best quick cattle; and in default of such cattle, the best household stuffe or goods of what kinde soever of the late tenant." And it appears further, from arti-

(e) 1 Sider. 437.  
 (f) Dyer 199 b.

(g) 2 Bing. N. C. 679; 2 Hodges. 237.  
 (h) 1 Bos. & Pul. 282.

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cle 16, that all half-yard lands within the manor, holden by copy, of which description is the tenement in question, are heriotable.

So far, therefore, as depends on these two customs, the case is free from all doubt. If no other custom had been set forth in the decree, the right of the lord of the manor to seize the horse, as the best quick cattle of the late customary tenant, upon his death, would have been inevitable, and the plaintiff, the lord of the manor, would have been entitled to judgment in this action.

But the difficulty arises from the custom set out in the seventeenth article, by which it is provided "that if any customary tenant shall let or set his half-yard land which is heriotable, and at his decease the lord not answered the best beast for his heriot, which did commonly manure the said premises by the space of one year before his decease, or the full value thereof, then such person to whom the same yard or half yard, by the custom ought to come, shall pay to the lord or his officers, within six weeks next after the death of such tenant, 3*l.* for every yard land, and 40*s.* for every half yard, instead of an heriot; and in case of default the lord may enter and take one year's profits." Now, on the part of the lord it is contended, that notwithstanding the case may fall within the seventeenth custom, by reason of the half yard land, being let or set at the time of the tenant's death, the lord has still the right to the best beast of the tenant, under the sixth and seventh customs; that the seventeenth custom only applies where the lord "has not been answered the best beast;" that is, has not seized the best beast, under the general customs, and that the seventeenth custom gives him a cumulative remedy against the new tenant or the land itself, in case the old tenant died without being possessed of a beast, or the lord was unable to seize it. On the other hand, the tenant insists that the seventeenth custom applies to and governs the case of a half yard land which is let and set at the time of the tenant's death, and that the lord in such case can only take the heriot given by that custom, or the substitute thereof, provided by the same custom, and cannot resort to the heriot given him by the general custom. And we think we do less violence to the language of the customs, by holding the interpretation contended for on the part of the tenant to be the right construction; namely, that where the half yard is let or set, the lord cannot seize the best beast, or best household stuff or goods of the late tenant, but must have recourse to the heriot or the substitute thereof, described and provided for by the seventeenth custom.

In the first place it is difficult to hold the seventeenth custom, as giving a cumulative remedy to the sixth, when it provides for and relates to only one of the cases governed by the general custom. For whilst the general custom gives the lord a heriot both upon surrender and descent, the seventeenth custom applies itself to the case of descent only. Again, whilst the general custom gives as a heriot, the best quick cattle, and, in default of such cattle, the best household stuff or goods, the seventeenth custom is altogether silent as to the alternative, and gives only the best beast; and as to the argument on the part of the plaintiff that by the very terms of the seventeenth custom it is conditional only, namely, the lord not answered the best beast for his heriot, we agree that if the condition had stopped here, the conclusion contended for by the lord, would have been irresistible; but it continues thus, the lord not answered the best beast for his heriot, which did commonly manure the said premises by the space of one year next before his decease, or the full value

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thereof; so that the custom is so far from letting in the ordinary heriot due upon a descent, that it gives a heriot substantially different in kind and description in every case falling within it; the one giving the best quick cattle or best household stuff or goods of the customary tenant, the other giving the best beast which ordinarily manured the land for the year next before the tenant's death (whosoever it might be) or the value thereof. We think, therefore, we can give force to the two customs, in no other manner, than by holding the one to apply to the case where the customary tenant dies in occupation of his heriotable tenement, and the other to the case of the death of the tenant of a half yard of land, which is let or set at the time of his death.

In the course of the argument, many difficulties have been put by the plaintiff's counsel, as to the possibility of enforcing the seventeenth custom; such as the legality of a custom to seize the best beast of the occupier or of a stranger; the difficulty of applying the custom, if the premises have been manured only part of a year, and the like, but it is to be observed that the custom provides an election which is free from all difficulty; viz., the value of the beast, and as the payment is to be made by the tenant, the election is with him. And still further in case the payment of this heriot altogether fails, the custom provides a resource which is altogether free from exception; viz., the payment of 40s. instead of an heriot, and in default thereof, one whole year's profit of the land.

It is to be observed that by this construction the lord gains in many cases an immediate advantage, for he has the certainty of a heriot, or of a substitute for a heriot, which at the time was probably thought an equivalent in value, in every case of the death of a tenant of a half yard land, which is let and set; and again the customary tenant is bound to make good the payment in lieu of the heriot. Whereas under the general custom, he has only the best quick cattle or best household stuff of the customary tenant, which may be worth less, or the tenant may die without possessing any. It appears, therefore, a more just as well as sound construction, not to throw into the lord's scale the benefit of both customs; and we are the more inclined to this construction because, upon the general principles, the custom of heriots is not a custom to be extended in favour of the lord, and in this particular case the confirming of the custom, was the result of a bargain or agreement between the lord and the tenants, in which, according to the language of the arbitrators to whom the differences were referred, "the tenants have given for buying their peace, a very ample and liberal satisfaction to their landlord, not inferior in our opinions to the true worth of any benefits they shall or may receive by this order."

We therefore think, for the reasons above given, a *nolle prosequi* must be entered.

Judgment for defendant.

## DALLMAN v. KING.

Nov. 18.

CASE for an excessive distress. At the trial, before *Tindal*, C. J., at the London sittings after *Easter* Term, it was proved, that the defendant, as trustee for a charity, let a dwelling house and premises in *St. James's Street* to the plaintiff, at the yearly rent of 250*l.*, payable quarterly, by an agreement in writing bearing date the 29th of *August*, 1835. The agreement contained the following clauses:—"And the said *Thomas Dallman* doth hereby promise and agree, to spend out of his own proper monies, within one year from the date hereof, 200*l.*, at the least, in erecting and building a kitchen to the said messuage with necessary fittings; and also in altering the large room one pair story, into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation; such erection and alterations or repairs to be inspected and approved of by the said *William King*, and to be done in a substantial manner; and it is agreed that the said *Thomas Dallman* shall be allowed 200*l.* towards such erection and alteration or repairs, and shall be at liberty to retain the same, out of the first year's rent of the premises. And the said *T. Dallman* doth hereby further promise and agree to pay to the said *W. King*, or to the trustees for the time being of the said charity, the said yearly rent of 250*l.* at the times and in manner aforesaid." The plaintiff having entered upon the premises, caused sundry repairs and alterations to be made at the cost of 200*l.* and upwards, within one year from the date of the agreement; but the defendant did not approve of some portions of the work, and when the first year's rent became due, he allowed the plaintiff 115*l.* 17*s.* on account of the repairs, and distrained for the balance of the year's rent, after giving the plaintiff credit for 50*l.*, which he had offered to pay.

It was contended on behalf of the defendant, that his approval of the alterations, was a condition precedent to the plaintiff's right to deduct the 200*l.* out of the first year's rent. The learned judge refused to nonsuit the plaintiff, and left it to the jury to say, whether the work had been done in a proper and substantial manner, and to the amount stated in the agreement. The jury found a verdict for the plaintiff.

*Talfourd*, Serjt., in pursuance of leave reserved, obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit upon the objection made at the trial. He cited *Morgan v. Birnie* (a).

*Wilde*, Serjt., and *J. Bayley* shewed cause.—The opinion of the learned judge at the trial, was correct. In all questions as to conditions precedent, the situation of the parties in the particular case, must be considered. In the present instance the stipulation does not go to the whole of the consideration.

(a) 9 Bing. 672.

approval of the lessor was not a condition precedent, and that after the jury had found that 200*l.* was expended by the plaintiff, in substantial repairs, he was entitled to recover in the action.

An agreement for the lease of a house contained the following clauses, "and the said T. D., [the lessor,] doth hereby agree to spend, within one year from the date hereof, 200*l.*, at the least, in erecting a kitchen to the said messuage, and also in altering the large room into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation, such erection and alteration or repairs, to be inspected and approved of by the said W. K., [the lessor,] and to be done in a substantial manner; and it is agreed that the said T. D. shall be allowed 200*l.* towards such erection and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises."

The lessee laid out more than 200*l.* but the lessor did not approve of all the work, and distrained for the balance of the first year's rent. *Held*, in an action brought by the lessee for an excessive distress, that the

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The jury have found that 200*l.* and upwards, was laid out in making substantial repairs, and the defendant was not justified in withholding his approval, *Morgan v. Birnie* (b) is not an authority to shew that this was a condition precedent. Here there is nothing said about a certificate being required from the defendant, and as between him and the plaintiff, no act was necessary to be done. The agreement merely provided that the alterations or repairs should be inspected and approved of by the defendant, and be done in a substantial manner. The argument on the other side must go to the extent of shewing that no part of the money expended ought to have been allowed; but the defendant, by giving credit for a portion of the repairs, has admitted that he cannot treat the promise as a condition precedent. In *Hotham v. The East India Company* (c) it is said upon the subject of conditions precedent, "That there are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent; neither doth it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant; for the same words have been construed to operate as either the one or the other, according to the nature of the transaction. The merits, therefore, of the question must depend on the nature of the contract and the acts to be performed by the contracting parties, and the subsequent facts disclosed on the record which have happened in consequence of this contract."

In *Boone v. Eyre* (d) Lord Mansfield, C. J., lays down the distinction as clear, that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. That case was supported in *Fothergill v. Walton* (e), *Ritchie v. Atkinson* (f), and *Stavers v. Curling* (g). *Miller v. Burn* and *George v. Jackson* from the MS. of Mr. Justice Bayley, were also cited (h).

(b) 9 Bing. 672.

(c) 1 T. R. 645.

(d) 1 H. Black. 273 n.

(e) 8 Taunt. 576.

(f) 10 East, 295.

(g) 3 Scott, 740; 2 Hodges, 237.

(h) The reporter has been favoured with a sight of the notes of the above cases, made by this distinguished judge; as the cases are not reported, a copy is subjoined.

"Plaintiff let defendant an hotel, upon certain conditions, one of which was that plaintiff should, within two months, build a taproom; and the defendant covenanted, that, at the end of the term, he would take, at a valuation, the tap to be built by plaintiff as aforesaid. At the end of the term defendant would not pay for the tap, and action *inde*. The declaration averred that plaintiff built the tap, but it did not allege that he built it within two months, and, after judgment by default, error on that objection; but the Court thought it clear that the building within the two months was not a condition precedent, as it did not go to the whole, and the counsel for the plaintiff in error, did not press to argue it. Judge-

ment affirmed. *Miller v. Burn*, *Michaelmas*, 1813, K. B."

"If a ship owner charters her, and covenants that when the lading, ordered on board by the charterer, shall be received, the ship shall proceed, it is not a condition precedent that the ship shall be fully laden, though the owner is to have so much per ton freight.

If there is not a full loading, the owner's remedy is by a cross action.

Defendant chartered his ship to the transport board, and covenanted that the master should obey their orders, and that when the lading they should order on board should be received, and he should have signed bills of lading for them, he should proceed; they put goods on board him and ordered him to proceed, but he did not, and covenant *inée* against defendant. Plea—That by the charter-party the commissioners were to pay 3*l.* 18*s.* 0*d.* per ton, for the goods delivered, and that the goods received did not amount to a full lading, and the master waited till he could procure a full lading. Demurrer, and on argument the Court were clear the plea was bad: it was not a condition precedent that the com-

*Talfourd, Serjt., contra.*—The stipulations contained in this agreement are not separate and independent, but when the whole of it is read, it will appear that the approval of the defendant was a condition precedent. *Morgan v. Birnie* (a) is precisely in point. There, in a building contract, it was provided that the contract should not be vacated by any additions or alterations, but that the price to be paid for such alterations should be settled by a surveyor, who was to be sole arbitrator in settling such price, and all disputes arising in or about the premises; and the defendant agreed to pay certain proportions of the contract price, upon receiving a certificate in writing signed by the surveyor, testifying that certain portions of the building had been done, and his approval thereof, and the balance that should be found due after deducting the previous payments, within two months after receiving the surveyor's certificate that the whole of the works had been completed to his satisfaction; and it was held that the obtaining the surveyor's certificate was a condition precedent to the plaintiff's right to sue upon the contract. The same objection might have been made there, as in this case, viz., that the stipulation did not go to the whole of the consideration.

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TINDAL, C. J.—The first question is, whether the defendant's approval of the repairs to be done by the plaintiff, was a condition precedent. Now in point of form it appears to me, upon looking at the agreement, that it is not a condition precedent. It cannot be, unless the words which precede the latter part of the agreement make it so in point of law. The words are, that *Dallman* shall spend 200*l.* at the least "in erecting and building a kitchen to the said messuage, with necessary fittings; and also in altering the large room one pair story, into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation, such erection and alterations or repairs, to be inspected and approved of by the said *William King*, and to be done in a substantial manner. And it is agreed that the said *Thomas Dallman* shall be allowed the sum of 200*l.* towards such erection and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises." Now the latter clause, beginning with the words "and it is agreed," is a separate and distinct clause from the former; and unless the word "*such*" is supposed to have so much force as to refer not only to the extent of the repairs, but also to the lessor's approval of them, it is not a condition precedent. We ought to be the less ready to give such a construction to the agreement, inasmuch as the subject-matter does not go to the whole consideration, for if all the repairs had been done, except the minutest fraction of them, the argument for the lessor would be as strong as it is now. But let us assume for a moment that it was a condition precedent. Two things were provided for. First, that the erection and repairs should be inspected and approved of by the lessor; and, secondly, they were to be done in a substantial manner. Now I cannot help thinking that the gist of this part of the agreement was, that the work should be done in a substantial manner, and that the lessor should be afforded an opportunity of ascertaining that it was in reality

professioners should furnish a full bill, because it did not go to the whole, and if the commissioners did not furnish as much as they were bound, the remedy was

by cross-action. Judgment for plaintiff. *George v. Jackson, Michaelmas, 1813.*"  
(a) 9 Bing. 672.

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done according to the agreement; because otherwise the lessor might wilfully refuse to approve of the work, and then it would be a condition which would go to the destruction of the thing granted, and, being repugnant to the whole agreement, might consequently be held void on that ground.

But let us go a step further, and see whether the jury have not found that there was a virtual performance of the agreement. The jury found that 200*l.* had been laid out in doing substantial repairs; that is, according to the intent of the parties who made the agreement. The case is distinguishable from *Morgan v. Birnie* (a); there the great object of the party was that he should not be liable to pay for the work, unless it was first approved by an architect, whose certificate was required, before any demand of the price of the work could be made.

That agreement cannot be read except as containing a condition precedent. Here it is doubtful whether there is any such condition; and if there is, then the jury have found that the agreement has been substantially performed. This rule must therefore be discharged.

VAUGHAN, J.—Whether an agreement contains a condition precedent or not must depend upon the instrument itself. In modern times the doctrine relating to conditions precedent, has been considerably relaxed, and there are cases where the Courts have rather preferred to treat such clauses as independent agreements. Looking at the intention of these parties I cannot put the construction on the word *such* which the defendant requires. The agreement is that *Dallman* shall spend within one year 200*l.* In doing what? “In erecting and building a kitchen to the said messuage, with necessary fittings; and also in altering the large room, one pair story, into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation.” Now it is clear what the parties intended. The lessor would not allow 200*l.*, if it was expended in mere decorations, but he required that it should be laid out in repairs of the description specified, which would make the house fit for habitation. The latter sentence, which stipulates for the lessor’s approval of the repairs, is quite distinct, and admits of this construction, and does not amount to a condition precedent. The argument, on behalf of the defendant, amounts to this, that if he capriciously and childishly refused to approve of the repairs, the plaintiff would be without any remedy, and the defendant’s simple negative would defeat the justice of the case. It, therefore, appears to me, that this is not a condition precedent; and even if it were, the jury have found that it has been substantially complied with. As far as the defendant’s acts appear, he has not treated it as a condition precedent, because he has given the plaintiff credit for 115*l.* on account of the repairs.

BOSANQUET, J.—This case depends upon the construction which is to be given to the agreement; the Court cannot take into its consideration that the defendant was not contracting for his own benefit. The plaintiff entered on the premises as tenant to the defendant, and agreed to lay out 200*l.* in the

(a) 9 Bing. 672.

manner which was specifically mentioned, or in such repairs as might be necessary to make the premises fit for habitation. The jury have found that this part of the contract has been performed by the plaintiff. The agreement goes on to say "such erections and alterations or repairs to be inspected and approved of by the said *William King*, and to be done in a substantial manner." If this sentence had commenced thus—"And it is further agreed that such alterations shall be inspected," &c., it would hardly have been contended that it amounted to a condition precedent; and I have great difficulty in saying that there is any substantial difference between the two forms of expression. Then we come to the clause—"that the said *Thomas Dallman* shall be allowed the sum of 200*l.* towards such erection and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises." This is, in its form, a distinct agreement that the lessee shall be allowed 200*l.*; and the description of the repairs for which the allowance is to be made is given. It is contended that the word "such," embraces not only the description of the repairs, but also the provision that they must have been approved of by the lessor; but that construction would make the condition precedent, repugnant to the principal object of the agreement, and would therefore make it void. *Morgan v. Birnie* (c) has been relied upon, but that case is clearly distinguishable: here there is no condition precedent, and there is nothing to prevent the plaintiff from deducting the amount of the money which the jury have found that he has expended.

COLTMAN, J.—The first question is, whether this is a condition precedent? If we should hold that it is not, no inconvenience will happen to the defendant; because, if the plaintiff has not expended the money in repairs, he will not be entitled to retain it out of the rent. On the other hand, if we say that the agreements are dependent, the inconvenience to the plaintiff may be very great; inasmuch as if he had expended only 199*l.* in repairs, he would not be entitled to make any deduction from the rent, and he would be without any other remedy. It appears to me that there is nothing so stringent in this agreement as to oblige us to treat it as a condition precedent. *Morgan v. Birnie* (c) is quite distinguishable. It is said that the defendant may capriciously withhold his approval of the repairs, and so deprive the plaintiff of his right to retain the money, and I do not say that a party may not enter into such a contract; but before the Court would put such a construction upon this agreement, they would see that the words used are so strong that they cannot be understood in any other way. Here the jury have found that the repairs were substantially done, and I agree that this rule ought to be discharged.

Rule discharged.

(c) 9 Bing. 672.

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## PLANCHE v. BRAHAM.

The plaintiff wrote the English words for the representation of *Weber's* opera of *Oberon* and the defendant afterwards caused other words to be adapted to the same music, and produced the opera at his theatre; but in the course of the representation, the performers introduced several of the plaintiff's songs instead of the new version. In an action brought by the plaintiff against the defendant to recover the penalty given by the 3 & 4 W. 4, c. 15, sec. 2, the jury found a verdict for the plaintiff; and, upon a motion for a new trial,—*Held*, first that the question as to what was a representation of a dramatic production, in contravention of the statute, is a question for the jury; and, secondly, that the facts which were proved at the trial warranted the verdict.

**D**EBT on the stat. 3 & 4 W. 4, c. 15, sec. 2 (a), for representing certain portions of a dramatic piece, of which the plaintiff was the author. The first count of the declaration stated that theretofore, and within the space of ten years next before the passing of a certain act of parliament made and passed in the reign of his Majesty *William* 4, being An Act to amend the Laws relating to Dramatic Literary Property, to wit, on the 1st *January*, 1836, the plaintiff did compose, print, and publish a certain dramatic piece called *Oberon*, and from the time of the passing of the said act, hitherto had been the proprietor thereof, and during all that time had had the sole liberty of representing, or causing to be represented, the said dramatic piece at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of *Great Britain* and *Ireland*, in the Isles of *Man*, *Guernsey*, and *Jersey*, or in any part of the British dominions; nevertheless the plaintiff said that, after the making and passing of the said act of parliament, and within twelve calendar months next before the commencement of this suit, and also whilst the plaintiff was such proprietor of the said dramatic piece, and had such sole liberty of representing, or causing to be represented, the same as aforesaid, and during the continuance of the same liberty, to wit, on the 26th *December*, 1836, he the defendant did, without the consent in writing of the plaintiff, cause certain parts, to wit, certain verses, songs, and duets, and portions of songs and duets, of the said dramatic piece to be represented at a certain place of dramatic entertainment, to wit, at the *St. James's Theatre*, situate, &c., in that part of the United Kingdom called *England*, contrary to the form of the statute and the intent thereof, and the right of the plaintiff as such author and proprietor as aforesaid; whereby, and by force of the said statute, the defendant became liable to pay to the plaintiff, being such author and proprietor as aforesaid, and having such sole liberty as aforesaid for and in respect of such representation, an amount not less than 40s., or the amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages; and the plaintiff said that the amount of the injury sustained by the plaintiff from the said representation of the said piece amounted to a large sum of money, to

(a) Stat. 3 & 4 W. 4, c. 15, s. 2, enacts, "That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40s. or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, which-

ever shall be the greater damages to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietors, in any court having jurisdiction in such cases, in that part of the said United Kingdom or of the British dominions in which the offence shall be committed; and in every such proceeding, where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority or otherwise mentioning the same."

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wit, the sum of 100*l.*, the same being the greatest damages recoverable by the plaintiff according to the form of the statute, in respect of the representation of the said dramatic piece by the defendant as aforesaid, whereof the defendant then had notice, whereby, and by force of the aforesaid statute, an action had accrued to the plaintiff to demand from the defendant the said sum of 100*l.*, parcel of the sum above mentioned.

Second count—That after the making and passing of the said act of parliament, and within twelve calendar months next before the commencement of the suit, and whilst the plaintiff, having so composed, printed, and published the said dramatic piece within the space of ten years next before the passing of the said act, as in the first count mentioned, was the proprietor thereof, and had the sole liberty of representing, or causing to be represented, the said dramatic piece at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of *Great Britain and Ireland*, in the Isles of *Man, Guernsey*, and *Jersey*, or in any part of the British dominions, as in that count also mentioned, and during the continuance of the same liberty, he, the defendant, on twelve several occasions, to wit, on each of the days following, that is to say, on, &c., did, without the consent in writing of the plaintiff, cause certain parts, to wit, certain verses, songs, duets, and portions of songs and duets of the said dramatic piece to be represented at the said place of dramatic entertainment, to wit, at the *St. James's Theatre*, situate as aforesaid, in, &c., in that part of the United Kingdom called *England*, contrary to the form of the said statute and the intent thereof, and the right of the plaintiff as such author and proprietor as aforesaid; whereby and by force of the said statute, the defendant became liable to pay to the plaintiff, being such author and proprietor as aforesaid, and having such sole liberty as aforesaid, for and in respect of each of the representations in this count mentioned, an amount not less than 40*s.*, or the amount of the benefit or advantage arising from each of such representations, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages; and the plaintiff said that the sum of 40*s.* is the greatest damages recoverable by the plaintiff according to the form of the said statute in respect of each of the said representations of the said dramatic piece by the defendant, as in this count mentioned, whereof the defendant then had notice, whereby and by force of the said statute, an action had accrued to the plaintiff to demand from the defendant the sum of 40*s.*, in respect of each of the said representations of the said dramatic piece as aforesaid, together amounting to the sum of 24*l.* residue of the said sum above demanded. Yet the defendant had not paid the said sum above demanded, or any part thereof, to the damage, &c.

At the trial before *Tindal, C. J.*, at the *London Sittings* after *Trinity Term*, it appeared that the plaintiff had written the English words for *Weber's* opera of *Oberon*, which was performed at *Covent Garden Theatre* in 1836, and that the defendant then performed the principal character of *Sir Huon*.

The defendant afterwards produced the same opera at his own theatre in *St. James's Street*, under the name of *The Enchanted Horn*, with English words adapted to the music, and the defendant again performed the same character as at *Covent Garden Theatre*. It was proved that the defendant and other performers sung the words written by the plaintiff, in three songs and concerted pieces, and that the whole of the piece appeared to be a paraphrase of

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the plaintiff's opera. Witnesses were also called to prove that, in their judgment, the representation of *The Enchanted Horn* caused an injury to the plaintiff's copyright. The learned judge said he was of opinion that the evidence was sufficient to shew that there had been an infraction of the statute, and he left the jury to say whether the defendant had represented any part of the plaintiff's opera. A verdict was found for the plaintiff, damages 40s.

*Wilde*, Serjt. moved for a new trial.—The question is, whether the evidence which was given, proved that there had been a representation of the plaintiff's production, or of any part thereof, within the meaning of the statute. A part of a production, does not mean any small number of lines or a single paragraph, but a substantial portion of the whole piece. The evidence shewed that only very small and unimportant portions of the plaintiff's production, had been used at the defendant's theatre. The construction of the statute ought to be based upon broad and general principles. It is evident in this particular case, that the words which were sung were merely accessory to the music, and the music was the common property of both parties.

TINDAL, C. J.—It appears to me that this is a question which must in all cases be left to the jury. The new statute directs that if any person shall represent any production, or any part thereof, without the consent of the author, he shall be liable, for every such representation, to the payment of not less than 40s., or to the full amount of the benefit arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages. It is impossible to lay down a general rule as to what is or what is not a representation of part of a dramatic production, but in all cases it must be left to the jury to determine the fact; that has been done in the present case, and I was also of opinion that there had been a representation of a part of the plaintiff's opera. The statute does not merely give the plaintiff damages, but it operates as a prohibition, and renders a defendant liable to the payment of 40s., although no damage may be found to have been sustained. Besides, as the jury have given a verdict of 40s., we should infringe the usual rule which has been established, if we directed a new trial upon the ground that the verdict is against the evidence.

VAUGHAN, J.—It is impossible to lay down any general rule as to what is a representation of a part of a dramatic piece: it may be often a very nice question, and must in all cases be left to the jury. The jury having found a verdict in this case for 40s. I agree that it ought not to be disturbed.

BOSANQUET, J.—The legislature has forbidden the representation of any part of a dramatic piece without the author's consent, and it appears to me that there has been an infraction of the statute in the present instance.

COLTMAN, J.—I am of the same opinion. This case has been left to the jury, and we ought not to interfere.

Rule refused.

## VINE v. SAUNDERS and ELIZABETH his Wife.

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**TRESPASS.**—The declaration stated that the defendants heretofore, to wit, on, &c., with force and arms, &c., assaulted the plaintiff and then caused the plaintiff to be arrested and taken into custody upon a false charge of felony, then made by the defendant, against the plaintiff, and then forcibly compelled the plaintiff to get out of the bed in which the plaintiff then was lying, and then indecently and indelicately forced and compelled the plaintiff to go from and out of a certain bedroom, parcel of a certain dwelling-house, situate and being in the county of *Hertford*, in certain night clothes, in which the plaintiff was then dressed, in the presence of divers, to wit two men, down the stairs of the said dwelling-house, into another room, parcel of the said dwelling-house, and then indecently and indelicately kept and detained the plaintiff in custody in the last mentioned room, in the presence of the said men, in the said night clothes, without decent apparel, for a long space of time, to wit, twenty minutes then next following; and also then, during the night-time, forced and compelled the plaintiff to go from and out of the said dwelling-house, into and along divers public highways, in the county aforesaid, to a certain other dwelling-house, in the county aforesaid, and there imprisoned the plaintiff, and kept and detained her in prison, without any reasonable or probable cause whatsoever, in the said last-mentioned dwelling-house, for a long space of time, to wit, for six hours then next following, and during the night-time; contrary to the laws and customs of this realm, and against the will of the plaintiff, whereby the plaintiff was, during that time, deprived of her necessary sleep and rest, and suffered great alarm and inconvenience, and distress of mind, and was also thereby then greatly exposed and injured in her credit and circumstances, and other wrongs, to the plaintiff then did, against the peace of our lord the king, to plaintiff's damage, &c.

*General demurrer and joinder.*

*Petersdorff*, in support of the demurrer.—This action ought to have been brought against the husband alone. The earliest authorities to be found upon this subject are in *Yelverton's Reports*, *Drury v. Dennis* (a); *Draper v. Fulkes* (b); *Anonymous* (c). But those cases do not decide the question now before the Court, and in principle they are distinguishable. In *Rogers and Wife v. Goddard* (d) it was held that husband and wife ought not to join in trespass for an assault upon the wife. It is true that in *White v. Eldridge* (e) it was held that trespass would lie against husband and wife, but that was upon motion in arrest of judgment, after verdict. So in *Keyworth v. Hill* (f) a declaration in trover against husband and wife stated that the defendants converted the property to their own use, and it was held sufficient after verdict. The authorities collected in *Com. Dig. tit. Baron and Feme, Y.* are somewhat

Trespass for assault and false imprisonment, will lie against husband and wife jointly.

(a) *Yelv.* 106; 1 *Brownl.* 209; 1 *Sid.* 376.

(d) 2 *Show.* 255.

(e) *Lord Ray.* 443.

(f) 3 *B. & Ald.* 685.

(b) *Yelv.* 165.

(c) *Yelv.* 166.

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contradictory. If the husband died before judgment, and after verdict, then the wife would be liable to pay damages for the wrong committed by her husband, which is a strong and sufficient reason why this declaration ought not to be supported. There are many cases which decide that a joint action of trespass, cannot be maintained by husband and wife for a trespass done to them individually. *Newton v. Hatter(g)*, *Dugwell v. Marshall(h)*, *Hockett v. Stidolph(i)*, *Rogers v. Goddard(k)*, and the rule is recognised in *Milner v. Milnes(l)*. The principle upon which all the authorities are decided is this, that the wife has no interest in the husband's person.

*J. Addison, contrâ.*—Many of the cases which have been cited are not applicable to the present question, because they related to actions of trover. In *Watson v. Thorpe(m)*, in battery against husband and wife, the husband justified that the plaintiff assaulted his wife; the wife, by herself, pleaded *de son assault demesne*; and the plaintiff replied *de injurid*. Both issues were found for the plaintiff, and damages entirely given; and it was alleged, in arrest of judgment, that the trial was ill, for the wife, by herself, could not plead, and the damages being entirely assessed, all was ill. "The Court was of that opinion, and awarded that they should replead." Now this is a direct authority in favour of the plaintiff, because no objection was made that trespass was not sustainable against the husband and wife; nor would the Court have awarded a repleader. In *Berry v. Nevys(n)* it was admitted, that a joint battery or imprisonment might be charged against husband and wife, In *Keyworth v. Hill(o)*, which has been cited on the other side, *Bayley, J.*, says—"It is quite clear that, in trespass, the husband and wife might be jointly sued; the reason of which is, that the action is founded on the wrongful act of the defendants." In Com. Dig. tit. Pleader (2 A 2) it is said—"Yet trespass against husband and wife, for taking goods is good, though the conversion is said to be to their own use; for the conversion is not the gist of the action as in trover." *Smalley v. Kerfoot(p)* was an action of trespass, against husband and wife, for entering the plaintiff's house and taking his goods; and, after judgment by default, and a writ of inquiry executed, it was moved, in arrest of judgment, that the declaration was ill, because it alleged the conversion to be to the use of the wife, but the Court overruled the objection; as this motion was made after a judgment by default, it was the same as if the same objection had been made on demurrer.

*Petersdorff*, in reply.—It appears by the report of *Smalley v. Kerfoot*, in *Strange(q)*, that the objection was made after a verdict for the plaintiff. No direct authority has been produced in support of this declaration.

TINDAL, C. J.—I think this action is maintainable. No direct authority has been cited to shew that it is not; and, as far as the cases go, they lead one's mind to the opposite conclusion. The first authority is *Watson v.*

(g) Lord Ray. 1209.  
 (h) 2 Lev. 20.  
 (i) 2 Mod. 66.  
 (k) 2 Show. 255.  
 (l) 3 T. R. 627.

(m) Cro. Jac. 239.  
 (n) Cro. Jac. 661.  
 (o) 3 B. & Ald. 687.  
 (p) Andrews, 242.  
 (q) Strange, 1093.

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*Thorpe*. There an objection being made in an action of trespass against husband and wife, that the wife had pleaded by herself, the objection was allowed; but the Court would not have awarded a repleader, if they had not been satisfied that the action was maintainable. The second case is *Berry v. Nevys* (q), where it is admitted at once, without argument, that husband and wife may be charged with a joint battery or imprisonment. Then comes *Smalley v. Kerfoot* (r), which was an action of trespass, brought against husband and wife, for entering the plaintiff's house, seizing his goods, and converting them to their own use. According to the report in *Strange*, it is put as if the motion in arrest of judgment, was made after verdict. The resolution of the Court is delivered by the Chief Justice, who says—"that this being trespass, it was well enough; for the conversion here is not the gist of the action, as it is in trover, this action being maintainable for entering the house, and taking the goods; and we must take it the damages were given only for that." This is a direct and distinct authority upon the point; and although it is said, in *Strange*, that this was after verdict, I cannot agree that the effect of the decision is altered, because another reporter, who states the case more in detail, says that it was after a judgment by default and damages assessed on a writ of inquiry. There is also the very high authority of Mr. Justice *Bayley*, in *Keyworth v. Hill* (s), and the passage in Com. Dig. tit. Pleader, 2 A 2, which has been referred to. I am, therefore, of opinion that the plaintiff is entitled to our judgment.

VAUGHAN, J.—It is incumbent on the defendants to produce a direct authority in support of this objection, but none has been shewn. *Keyworth v. Hill* (s) satisfies my mind that this action may be maintained. Mr. Justice *Bayley*, who had been a pleader, and who was not likely to give expression to a rash opinion, says in the most unequivocal manner, that in trespass the husband and wife may be jointly sued. The present is a much stronger case than an action for taking goods. *Watson v. Thorpe* (t) is also an authority in favour of the plaintiff.

BOSANQUET, J.—I am also of opinion that this demurrer must be overruled. No authority has been cited to shew that this action cannot be maintained. On the contrary there are some strong cases in favour of the plaintiff. In *Watson v. Thorpe* (t) a repleader would not have been awarded if the Court had considered that the action was not maintainable. In *Berry v. Nevys* (q) it seems to have been admitted that husband and wife may be charged with a joint battery or imprisonment. Then come the two reports of the case of *Smalley v. Kerfoot* (r), and it is impossible to read the report in *Andrews*, without being satisfied that *Andrews* is correct, in stating that the question arose after a judgment by default and a writ of inquiry executed. In *Keyworth v. Hill* (s) it was held, that trover might be maintained against husband and wife when the conversion might have been the act of the wife. It is admitted that for an assault the husband and wife are both criminally responsible. There does not seem to me to be much weight in the argument, that the wife

(q) Cro. Jac. 661.

(r) *Andrews*, 242; 2 *Strange*, 1093.

(s) 3 B. & Ald. 687.

(t) Cro. Jac. 239.

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might be answerable for all the damages, if the husband died after verdict, but it is unnecessary to say more upon that part of the case.

COLTMAN, J.—The argument advanced for the defendants rests upon the position that the wife ought not to be made responsible for the whole of the damages, but it is not necessary to go into that question. How far do the authorities go? The cases relating to actions brought by husband and wife are foreign to the present question, and no authority has been cited to shew that they may not be made joint defendants. On the contrary, *Watson v. Thorpe* (a), *Berry v. Nevys* (b), and *Smalley v. Kerfoot* (c) are express authorities the other way.

Judgment for plaintiff.

(a) Cro. Jac. 239.  
(b) Cro. Jac. 661.

(c) Andrews, 242: 2 Strange, 1093.

Nov. 16.

### STROTHER v. HUTCHINSON and another.

1. A bill of exceptions will lie from a judgment in the county court.

2. And it will lie where the plaintiff was nonsuited, after he had appeared and refused to submit to a nonsuit.

3. A *verdict de novo* cannot be awarded to a county court.

**FALSE** judgment from the county court of *Yorkshire*. The declaration was in debt for work and labour, as a surgeon, performed by the plaintiff upon one *Humphrey* at the request of the defendants. *Plea*—*Nil debent*, and issue thereon.

The proceedings at the trial were stated on the record, which was returned by the sheriff, and it was stated that the jury were ready to give their verdict, and the record proceeded as follows:—"Upon which the said *W. J. Strother*, being solemnly called, does not further prosecute his said writ against *J. Hutchinson* and *J. Langstaff*. Therefore it is considered that the said *W. J. Strother* take nothing by the said writ, but that he and his said pledges to prosecute, be in mercy, &c., and that the said *J. Hutchinson* and *J. Langstaff* do go thereof without day, &c.; it is also considered by the Court here, that the said *J. Hutchinson* and *J. Langstaff* do recover against the said *W. J. Strother* 33l. 13s. Od., for their costs, &c., and that the said *J. Hutchinson* and *J. Langstaff* have execution thereof, &c.; at which court, to wit, at the eleventh county court of H. P., sheriff of the county, aforesaid, comes the said *W. J. Strother*, by his attorney, and then and there excepts to the nonsuit above mentioned, and then and there tenders and proposes his bill of exceptions, to which the said H. P., the said sheriff, at the request of the said attorney, and with the concurrence of the counsel of the said *J. Hutchinson* and *J. Langstaff*, put his seal, pursuant to the statute, in such case made and provided."

It appeared, by the bill of exceptions, that the action was brought by the plaintiff against the defendants, as overseers, for the time being, of the township of *Hutton*, for attendances upon a pauper in the time of preceding overseers, and that the defendants denied their liability on the ground that they were not overseers at the time of the attendances; but that the plaintiff contended that they were liable in consequence of their being overseers at the time the action was commenced, it proceeded as follows: "nevertheless the said sheriff and suitors did then declare, that the said *W. J. Strother* had brought his action against the wrong parties, and could not, in point of law, maintain the same

against the said *J. Hutchinson* and *J. Langstaff*, and though the said *W. J. Strother* did then and there, by his said attorney, insist upon the cause being left to the jury, and did offer to abide their determination, and did appear on his being called, and did refuse to consent to a nonsuit; yet the said sheriff conceiving that there was no matter of fact to be left to the said jury, and not being required, on the part of the said *W. J. Strother*, to submit to them whether the said *J. Hutchinson* and *J. Langstaff* were the overseers of the township of *Hutton*, at the time his alleged cause of action accrued, did then and there, with the consent of the said suitors, order the said *W. J. Strother* to be called, and did then and there declare that the said *W. J. Strother* was nonsuited, and the jury thereupon did not give a verdict; whereupon the said *W. J. Strother*, by his said attorney, did then and there except to the opinion of the said sheriff, and did insist on the said *W. J. Strother's* right to maintain his aforesaid action against the said *J. Hutchinson* and *J. Langstaff*, as overseers as aforesaid for the alleged cause of action, and also on the illegality of nonsuiting him, the said *W. J. Strother*, without his consent and contrary to his wish; and inasmuch as the said several matters so produced and given in evidence on the part of the said *J. Hutchinson* and *J. Langstaff*, and insisted on as aforesaid, do not appear by the entry of judgment of nonsuit as aforesaid, the said *W. J. Strother* did then and there propose his aforesaid exception to the opinion of the said sheriff, and requested the said sheriff and suitors to put their seals to his bill of exceptions, containing the said several matters so produced, and examined in evidence as aforesaid, according to the form of the statute in such case made and provided.

The error assigned was that the plaintiff ought not to have been nonsuited.

*Archbold*.—The sheriff had no authority to nonsuit the plaintiff against his consent, and it cannot be done even where there is an insuperable objection to the plaintiff's right to recover. *Minchin v. Clement(a)*. By the statute of *Westminster 2(b)*, "When one that is impleaded before any of the justices doth alledge an exception, praying that the justices will allow it; which, if they will not allow, if he that alledged the exception do write the same exception, and require that the justices will put to their seals for a witness, the justices shall so do; and, if one will not, another of the company shall; and if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff shew the exception written, with the seal of a justice put to, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal; and, if the justice cannot deny his seal, they shall proceed to judgment, according to the same exception, as it ought to be allowed or disallowed." And, according to *Lord Coke's* commentary this statute is applicable to the county court, although if the express words of the statute were relied upon, it would appear that a bill of exceptions would only lie in the Common Pleas(c). But the statute has always been construed according to the construction which appears in *Lord Coke's* note. And there is more reason for giving such a remedy in causes tried in inferior courts, because as is observed by *Lord Coke* "the judges are more likely to erre." It is clear that a writ of error will lie upon a

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(a) 1 B. & Ald. 252.

(b) 2 Inst. West. 2. cap. 31, 426.

(c) 2 Inst. 427 (2).



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*W. H. Watson*, for the defendants.—When a plaintiff is nonsuited, he must be supposed to be absent from the court, and he cannot therefore be present to tender a bill of exceptions. A county court is not a court of record; and no instance is to be found in the books, where a bill of exceptions has been allowed in a court not of record. This is a very strong fact to shew that the argument used on the other side cannot be supported. A county court is not within the statute, as the “justices” are required to affix their seals, and it is said that the “record” shall be returned before the king; whereas there are no justices, nor is there any record in the county court. A writ of error will not lie upon a nonsuit; and in Buller’s *Nisi Prius* (f) it is said, “A bill of exceptions is only to be made use of upon a writ of error, and therefore where a writ of error will not lie, there can be no bill of exceptions.” In *Rex v. Preston on the Hill* (g), it was expressly decided that no bill of exceptions will lie to the court of quarter sessions (h). The plaintiff may, perhaps, have a remedy by mandamus against the sheriff, and then the facts will appear by affidavit, but here the return shews that the plaintiff was not in court, and he was not therefore in a condition to tender a bill of exceptions.

*Archbold*, in reply.—The cases which have decided that no bill of exceptions lies at the quarter sessions, are distinguishable from the present. The justices at quarter sessions are to judge of the fact, as well as of the law, and the whole proceeding is contrary to the course of the common law. Here the writ of false judgment recites the proceedings which took place at the trial, and it is in substance similar to a writ of error. If a bill of exceptions will not lie in the county court, the plaintiff is altogether without a remedy; and the statute of *Westminster* has always received a liberal construction.

*TINDAL, C. J.*—This case has been sent before us by a writ of false judgment, after a bill of exceptions tendered in the county court; and several objections have been taken as to the legality of the proceedings. First, it is urged, for the defendants, that no bill of exceptions will lie from a county court. Undoubtedly, if we look at the statute of *Westminster* 2, it appears to refer only to proceedings before the justices of the superior court; but if we look also at the commentary of Lord Coke, which remains uncontradicted to the present day, and has, in part, been acted upon, we there find that the statute ought to receive a more extended construction. He says, “Albeit the letter of this branch seemeth to extend to the justices of the Court of Common Pleas only, by reason of these words, *Et si forte ad querimoniam de facto justic venire fac’ dominus rex recordum coram eo’*, (which is by writ of error into the King’s Bench,) yet that is put but for an example, and this act extendeth not only to all other courts of record, (for upon judgments given in them a writ of error lieth in the King’s Bench,) but to the county court, the hundred, and court baron, for therein the judges were more likely to erre; and, albeit of judgments given in them, a writ of

(d) 1 Stra. 235.

(e) 1 H. Black. 432.

(f) 5th ed. 316.

(g) Rep. Temp. Hardwicke, 231. See also 1 Burr. S. Cases, 77.

(h) 1 Stark. on Evid. 467.

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error lyeth not, but a writ of false judgment in the Court of Common Pleas, yet the case being in the same, or greater mischief, the purview of this statute, doth extend to those inferior courts (*h*).” Now I say that, looking at the letter only of the statute, it would appear that no bill of exceptions would lie in the Court of Queen’s Bench or the Exchequer, yet by every day’s practice we know that it lies in both these courts; and as we find these instances in the same sentence, I see no reason why we should not give the same degree of credit to Lord *Coke*’s opinion, that the statute is applicable to the county court and other inferior courts. It is to be observed that these are not mere loose expressions thrown out at random by the learned commentator, but his mind was evidently at work upon the subject before him, for he not only states that the statute is applicable to inferior courts, but he states the reason of it, and even anticipates the objection that a writ of error does not lie in those courts.

When, therefore, I find the authority of so great a man, not only uncontradicted, but his opinion adopted in the digests and books of authority, I think we are bound to hold it to be law now, and no one can doubt that this is a case within the mischief of the act.

But, in the course of the argument, it has also been objected that this was only a judgment of nonsuit, and that no writ of error lies upon a nonsuit, but the cases which have been cited are quite in point to shew that it does; and if a writ of error lies, so will a writ of false judgment.

Then it is said, that the improper direction of a nonsuit, is not a subject-matter for which a bill of exceptions will lie, but it seems to me, to fall quite within the reach of those cases where it has been held to apply. A bill of exceptions is not confined to errors in the reception or rejection of evidence; but it also applies to any direction given by the judge, which is incident to the course of the suit, as in allowing or refusing a challenge to a juror. So if he refuses a demurrer to evidence, when he ought to receive it. *Coot v. Bishop of St. David’s* (*i*), or if he refuses to receive a party, who prays to be received as vouchee. These and other points, which are important in the conduct of a cause, independently of the direction to the jury, are all the subject of a bill of exceptions, and it also appears to me to apply where the judge directs the plaintiff to be nonsuited, although he appears and refuses to submit to it. The only other point made for the defendants is, that as the nonsuit appears on the record, it cannot now be objected that the plaintiff appeared, and that he ought not to have been nonsuited; but that is setting up a defence, which is prohibited by the maxim, *Non potest adduci exceptio ejusdem rei cujus petitur dissolutio*. This judgment of nonsuit must therefore be reversed.

VAUGHAN, J.—I agree that this judgment must be reversed. The opinion of Lord *Coke* is stated in the clearest terms, as he expressly mentions the county court, the hundred court, and court baron.

BOSANQUET, J.—The first question is, whether a bill of exceptions lies in the county court. Upon this point, Lord *Coke* does not state his opinion loosely or carelessly, but he gives his reasons, and observes, that the words which are used in the statute, are put by way of example. This was sometimes the case in ancient statutes, and after this exposition of the statute of

(*h*) 2 Inst. 427 (n.)

(*i*) Cro. Car, 249.

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*Westminster 2*, I cannot doubt, that a bill of exceptions will lie in the county court. Then it is said, that it does not lie after a judgment of nonsuit; the consequence of this would be, that a judge may say, I am satisfied that the plaintiff has no right of action, and therefore, I order that the plaintiff be nonsuited. If the plaintiff chooses to appear, is he to be without any remedy? It appears to me, that as a bill of exceptions lies for the misconduct of a judge, in the conduct of a cause, it lies for this species of misconduct. As to the other objection, it seems to me, that the defendants are setting up as a defence, the very matter which is the subject of the objection.

COLTMAN, J.—I am of the same opinion. Lord *Coke*, and other writers since his day, say that a bill of exceptions will not lie from the county court, and although Mr. Justice *Buller* says, that it will only lie where a writ of error lies, he refers to the court of quarter sessions, which, as Mr. *Archbold* argued, is not a court according to the course of the common law.

As to the objection, that it does not lie upon a nonsuit, if that were so, a party would be altogether without remedy. It is also said, that the plaintiff cannot aver any thing which is contrary to the record: but that is answered by the maxim referred to by my lord. It appears, by the cases of *Trevor v. Wall(k)*, and *Bishop v. Kaye(l)*, that we cannot award a *venire de novo*; therefore the judgment must be reversed.

Judgment reversed.

(\*) 1 T. R. 151.

(l) 3 B. & Ald. 610.

Nov. 26.

### STAPLES and another v. HOLDSWORTH.

In an action by two plaintiffs, a defence that one of them became bankrupt after action brought and before plea, cannot be pleaded, after the defendant has obtained an order for time to plead, upon the terms of pleading issuably.

MOTION for leave to plead the bankruptcy of one of the plaintiffs. The declaration was delivered in *Trinity* Term, 1827; and in *May*, 1827, the defendant obtained an order for a month's time to plead, upon the terms of pleading issuably, rejoining gratis, and taking short notice of trial. The cause stood over until 1837, when a term's notice was given, and a demand of plea was made. Further time to plead was afterwards granted upon the same terms as before. The defendant pleaded non-assumpsit, and afterwards applied to *Bosanquet*, J., at chambers, for leave to plead the bankruptcy of one of the plaintiffs, which application was refused, on the ground that it was not an issuable plea. The alleged bankruptcy occurred in *June*, 1834. It appeared, that the assignees of the bankrupt had disclaimed interfering.

*R. V. Richards* shewed cause.—This is not an issuable plea; it is not a plea to the merits. A plea of non-joinder of a defendant, would clearly not be issuable, *Barker v. Skinner(a)*; and the same rule applies to the present case. The effect of allowing the plea would be merely to compel the plaintiff to bring a new action. The defendant is in no danger of paying the wrong per-

(a) Chitty, Jun., *Precedents of Pleas*, 11.

son, as he probably might be, if there was but one plaintiff who had become a bankrupt (b). It has been decided, that a plea of alien enemy is not issuable. *Simeon v. Thompson* (c). Here it is evident, that the object of the defendant is to compel the plaintiff to commence a new action, and if another action should be commenced, to plead the Statute of Limitations.

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*Wilde, Serjt., and Greenwood*, shewed cause.—The question is, whether a party who is under terms to plead issuably, thereby gives up a substantial defence which he may have to the action. By 6 Geo. 4, c. 16, s. 63, it is enacted, that all debts due to a bankrupt shall be assigned to the assignees, and that the bankrupt shall not have any power to recover the same. In *Foster v. Snow* (d), an issuable plea is said to be, "pleading such an issue, as the defendant could go to trial upon." *Sautell v. Gillard* (e) is to the same effect. It has been held, that a plea of alien enemy is not issuable, but that is on the ground of its being a dilatory plea; so a false plea is not issuable. *Serle v. Bradshaw* (f). In *Newham v. Dowding* (g), a special demurrer was allowed. Here the defendant does not attempt to delay the plaintiff, but he pleads a good defence, upon which issue may be taken. *Kinnear v. Tarrant* (h), *Biggs v. Cox* (i). If the assignees are honest in determining not to interfere, it is clear that there can be no good cause of action, because if there was, they would be bound to proceed for the benefit of the creditors. The defendant may be desirous of examining the bankrupt as a witness, or to give declarations made by the assignees in evidence, which he will be precluded from doing, if the plea is not allowed. The Statute of Limitations is not necessarily an unconscientious plea, and the defendant ought not to be prevented from pleading it. *Rucker v. Hannay* (k), *Maddocks v. Holmes* (l).

Cur. adv. vult.

TINDAL, C. J.—This was a motion for leave to plead the bankruptcy of one of the plaintiffs, which took place after the commencement of the action, in addition to the plea of non-assumpsit. It was made by way of appeal from the decision of a judge at chambers, who had refused to allow the two pleas. The defendant had had time given to him to plead on the usual terms, one of which was, that he should plead issuably, and the question debated on the motion before us was, whether the proposed plea was an issuable plea within the meaning of a judge's order: and we are of opinion that it is not. The meaning of the term "pleading issuably," as stated by Lord *Kenyon*, in *Simeon v. Thompson*, 8 T. R. 71, is not merely pleading a plea on which issue may be taken, but such a plea as goes to the merits; and the substantial merits of the action, in this case, are, whether the defendant ever entered into the alleged contract, and whether he has broken it; but the effect of the proposed plea, if allowed

(b) But see *Wettenhall v. Graham*, 4 Bing. N. C. 714; 1 Arnold, 286.

(c) 8 T. R. 71.

(d) 2 Burr. 781.

(e) 5 Dow. & R. 620.

(f) 2 Cr. & M. 148.

(g) 1 Chitt. 711.

(h) 15 East, 622.

(i) 4 B. & C. 620.

(k) 3 T. R. 124.

(l) 1 B. & P. 228.

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will be merely to turn the plaintiffs round, in order that the same question may be litigated in another action.

Now it is obvious, that the substantial merits of the controversy between these parties, may be tried as well in the present action as in one to be brought by the solvent plaintiff and the assignees of the bankrupt, against the present defendant. And it appears to us that no injury can result to the defendant from his being compelled to try the question of his liability in the present form of action; for, if the plaintiffs should recover judgment against him, and receive satisfaction, the present defendant can never be compelled to pay the money over again. Or if we put the case the other way, and suppose the defendant to succeed in the present action, and obtain a judgment on a plea which goes to the merits, we are of opinion, that in that case also the judgment would be a bar to any subsequent action which should be brought by the solvent plaintiff, in conjunction with the assigness of the bankrupt.

It was argued that the defendant may have a good defence against an action to which the assignees are parties, though such defence might not be available against the present plaintiffs, and that it is unjust to deprive him of any advantage which the proposed plea would give him. It appears to us, however, that the possibility of a good defence being made to the action, if brought by the assignees, does not render the plea an issuable plea on the merits. That must depend, not on any extrinsic circumstances, but on the nature of the defence raised by the plea itself. If there are any circumstances *dehors* the plea, which would render it fit that it should be pleaded, they may, in the particular case, furnish grounds for an application to be released from the terms of the judge's order, but they cannot make the plea itself an issuable plea. Another argument pressed upon us has been, that the defendant may wish to examine the bankrupt, or to give in evidence declarations made by the assignees; but we think the same answer applies to this as to the preceding objection.

A further ground on which the propriety of allowing the two pleas to be pleaded becomes very questionable, is, that the one is a plea in bar generally, and the other a plea to the further maintenance of the action; but as a decision on that ground would probably lead only to a further application to the Court in a different form, we have thought it best to decide the question upon the point which has been argued before us; and we cannot but observe, that in the particular case before us, there is the less reason to doubt that the plea is dilatory, as the assignees are stated to have disclaimed interfering.

We therefore think that this rule must be discharged.

Rule discharged.

BECKHAM *v.* KNIGHT and others.

Nov. 1.

THE plaintiff sued the defendants for the breach of an agreement, whereby they undertook to employ him at a salary for a term of years. The defendants demurred to the declaration, and, after joinder in demurrer, the plaintiff became a bankrupt.

*E. V. Williams*, on a former day, obtained a rule *nisi*, calling upon the plaintiff to shew cause why he should not give security for costs.

It appeared, by affidavit, that the plaintiff had obtained his certificate; that the action was continued by the attorney for the sole benefit of the bankrupt; and that the assignees did not intend to interfere. The bankrupt attributed his bankruptcy to the non-performance, by the defendants, of the agreement which was the subject of the action.

*Stammers* shewed cause.—The assignees have declined to interfere with the action, and the plaintiff is therefore at liberty to proceed in the usual course. *Morgan v. Evans* (a), is an express authority. In that case the Court refused to require the plaintiff to give security for costs, although it was sworn that he was insolvent, and that the action was brought in his name for the benefit of J. S., who was alone beneficially interested in the result.

So in *Townsend v. Snow* (b), the Court refused to set aside the proceedings, or to require an insolvent to give security for costs in an action where the assignees had refused to sue.

In *M'Culloch v. Robinson* (c), it was decided, that a bankrupt, who desired to dispute the commission of bankruptcy, ought not to be required to give security for costs, although he was gone abroad. In the present case the plaintiff attributes his bankruptcy to the non-performance of the agreement by the defendants; and it is against the equity of the case to assent to the present application. *Wilkinshaw v. Marshall* (d). In *Manley v. Mayne* (e), the action was carried on for the benefit of the bankrupt's assignees.

*E. V. Williams*, in support of the rule.—The defendants would have been entitled to allege the bankruptcy of the plaintiff in bar of the action, if they had not pleaded; *Kinnear v. Tarrant* (f). *Biggs v. Cox* (g). But as the effect of that would be to compel the assignees to commence a new action, it has been the practice to allow the bankrupt to proceed with the action upon giving security for costs. The principle, upon which such security is required, is, that it is a matter of right, that those who are to benefit by the proceedings, should be liable for the costs. *Mason v. Polhill* (h). In the present case, the action is in fact, proceeding for the benefit of the assignees, because it is founded on a chose of action which belonged to the bank-

After joinder in demurrer, the plaintiff became bankrupt, and afterwards obtained his certificate. The defendants applied for security for costs, but it being shewn that the assignees did not intend to interfere with the action, and that it was continued for the benefit of the bankrupt, the Court refused the application.

(a) 7 Moore 344.  
(b) 1 Marsh. 477; 6 Taunt. 123.  
(c) 2 New. R. 352.  
(d) 4 Tyrw. 993.

(e) 3 Man. & R. 381.  
(f) 15 East, 622.  
(g) 4 B. & C. 920.  
(h) 1 Cr. & M. 620.

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rupt before his bankruptcy. *Webb v. Ward* (i). The rule is the same as to insolvents. Where the plaintiff was discharged under the Insolvent Act after issue was joined, the Court stayed the proceedings until the assignee or some creditor should give security for costs. *Heaford v. Knight* (k).

TINDAL, C. J.—This case stands on its own peculiar grounds, and will form no rule for any other case not within the same circumstances. The action was brought and issue was joined before the bankruptcy; and, after the bankrupt obtained his certificate, the present application was made. If the matter had rested here, the motion would probably have been successful, but it appears that the assignees do not intend to interfere, but on the contrary, that the action is carried on for the benefit of the bankrupt. The case, therefore, falls within the principle laid down in *Townshend v. Snow* (l), where an application similar to the present was unsuccessfully made, and C. J. Gibbs said, referring to *Webb v. Ward*, “In that case the assignees were suing for their own interest in the name of the bankrupt; the present action, on the contrary, was brought because the assignees refused to sue at all.”

VAUGHAN, J.—This is an application to the discretion of the Court, and the possibility that the action may enure for the benefit of the assignees is not a sufficient reason for granting the application.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

Costs to be costs in the cause.

(i) 7 T. R. 296.

(k) 2 B. & C. 579.

(l) 1 Marsh. 477.

Nov. 10.

## STONE and others v. PHILLIPS and others.

Four actions between distinct parties, and all differences, were referred to arbitration; but the arbitrator did not notice or dispose of a fifth action which was pending, although it was a matter in difference, and was brought before the arbitrator; *Held*, that the award was altogether bad, notwithstanding the arbitrator had directed that mutual releases should be given by the parties.

MOTION to set aside an award. At the last *Oxford* assizes, by an order of Nisi Prius, four causes were referred to the arbitration of a barrister viz., *John Stone v. William Phillips*, *John Stone v. George Phillips and three others*, *Doe d. R. Stone v. Elizabeth Stone and others*, *Richard Stone v. Robert Stone*. By the terms of the order, the arbitrator was directed to settle the above-mentioned causes and all matters in difference, at law and in equity, between the parties, with leave to all other parties interested to come in within a month; the costs of the several causes to abide the event of the award, and the other costs to be in the discretion of the arbitrator.

The arbitrator, by his award, directed how the issues which had been raised in the four actions should be entered, and set out what interests in certain houses and fields, were taken by the various persons who claimed title to them, and which were the subject of the actions. He also awarded, that all the parties in the actions should execute releases of all actions, claims, and demands, touching any matter which was the subject of any of the actions referred, or any claim or dispute concerning any title to any of the premises.

*Cooper* obtained a rule nisi to set aside the award, upon the grounds, amongst others, that it was not final, and that it did not determine the claims

of *Richard Stone*, one of the parties. It appeared, by affidavit, that there was another action, not mentioned in the order of reference, between *Richard Stone* and *Robert Stone*, relating to part of the premises in dispute, and which action, in consequence of some mistake in the proceedings, was not ripe for trial at the assizes; but notice was given to the arbitrator of the claim of the said *Richard Stone*, and that the action was still pending, and was considered part of the matters in difference between the said *Richard Stone* and *Robert Stone*.

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*Keating* shewed cause.—In substance, the objection to this award is, that it is not final. As to the two first causes which were referred, the affidavit does not shew that any thing remains undetermined between the parties to those causes, and as there is an award of mutual releases, the award is at all events good as far as those parties are concerned. When an award is good on an independent question which is submitted to the arbitrator, it will not be vitiated by other parts which are faulty. *Manser v. Heaver* (a). *Thorp v. Cole* (b). Nothing can be more independent than two causes upon which an express adjudication is made. [*Tindal*, C. J.—You are bound to shew that a severance of the causes may be safely made. Here the causes all seem to refer to the same property.] Every intendment ought to be made to support the award, and the affidavits, on the other side, ought to shew that the award cannot be supported, as to the causes which are settled. In *Birks v. Trippet* (c), where the arbitrator had awarded general releases, it is said that the arbitrator was not bound to allow a debt, although the claim was notified to him. So, in *Wharton v. King* (d), it is laid down that where an arbitrator has awarded mutual and general releases, he must be deemed to have adjudged and finally decided upon the matters referred to him. In the present case, as the arbitrator has finally disposed of one matter, and then awarded general releases as to all matters, it is final and conclusive. The release is applicable to any state of circumstances which can be suggested.

*Cooper, contrà*—This award is not final. As far as the interests of *Richard Stone* are concerned, it is expressly shewn that an action in which he claimed a portion of the premises has not been disposed of. It clearly appears that notice was given to the arbitrator of the existence of that action, and he ought to have disposed of it. In the matter of *Robson* (e), on a reference of all matters in difference, a demand on one side was laid before the arbitrators, and immediately admitted by the other party; no evidence was therefore given concerning it, nor any adjudication upon it requested. The arbitrators published their award of and concerning the matters referred to them, directing payment of a sum of money, (without saying on what account,) to the party against whom the above claim had been made, with costs; and it being proved that they left that claim out of consideration in making their award, as a matter not in dispute, it was held that the award was bad, as the arbitrators ought to have taken notice of the admitted demand. *Mitchell v. Staveley* (f). The consideration upon which the arbitration was agreed to was, that all matters in dispute between the parties should be referred. In

(a) 2 B. & Ado. 295.

(b) 2 Cr. M. & R. 367; 1 Gale, 443.

(c) 1 Saund. 32 a.

(d) 2 B. & Ado. 528.

(e) 1 B. & Ado. 723.

(f) 16 East, 58.



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TINDAL, C. J.—This case stands on its own peculiar grounds, and will form no rule for any other case not within the same circumstances. The action was brought and issue was joined before the bankruptcy; and, after the bankrupt obtained his certificate, the present application was made. If the matter had rested here, the motion would probably have been successful, but it appears that the assignees do not intend to interfere, but on the contrary, that the action is carried on for the benefit of the bankrupt. The case, therefore, falls within the principle laid down in *Townshend v. Snow* (l), where an application similar to the present was unsuccessfully made, and C. J. Gibbs said, referring to *Webb v. Ward*, "In that case the assignees were suing for their own interest in the name of the bankrupt; the present action, on the contrary, was brought because the assignees refused to sue at all."

VAUGHAN, J.—This is an application to the discretion of the Court, and the possibility that the action may enure for the benefit of the assignees is not a sufficient reason for granting the application.

BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged.

Costs to be costs in the cause.

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(k) 2 B. & C. 579.

(l) 1 Marsh. 477.

No. 10.

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MOTION to set aside an award. At the last Oxford assizes, by an order of Nisi Prius, four causes were referred to the arbitration of a barrister viz., *John Stone v. William Phillips*, *John Stone v. George Phillips* and three others, *Doe d. R. Stone v. Elizabeth Stone and others*, *Richard Stone v. Robert Stone*. By the terms of the order, the arbitrator was directed to settle the above-mentioned causes and all matters in difference, at law and in equity, between the parties, with leave to all other parties interested to come in within a month; the costs of the several causes to abide the event of the award, and the other costs to be in the discretion of the arbitrator.

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*Cooper, contra*—This award is not final. As far as the interests of *Richard Stone* are concerned, it is expressly shewn that an action in which he claimed a portion of the premises has not been disposed of. It clearly appears that notice was given to the arbitrator of the existence of that action, and he ought to have disposed of it. In the matter of *Robson* (e), on a reference of all matters in difference, a demand on one side was laid before the arbitrators, and immediately admitted by the other party; no evidence was therefore given concerning it, nor any adjudication upon it requested. The arbitrators published their award of and concerning the matters referred to them, directing payment of a sum of money, (without saying on what account,) to the party against whom the above claim had been made, with costs; and it being proved that they left that claim out of consideration in making their award, as a matter not in dispute, it was held that the award was bad, as the arbitrators ought to have taken notice of the admitted demand. *Mitchell v. Staveley* (f). The consideration upon which the arbitration was agreed to was, that all matters in dispute between the parties should be referred. In

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(e) 1 B. & Ado. 723.

(f) 16 East, 58.

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some cases an award may be good as to part of the matter referred, but this case is not within that rule, but is like the case of *Turner v. Turner*(g), where an award was held to be bad, because some of the parties were left at liberty to prosecute their claims.

TINDAL, C. J.—I should have been glad, if I could have supported this award; but it appears to me, that one of the matters in difference has not been decided. At first, I thought the matter not disposed of, might have been severed, as in *Manser v. Heaver*(h), but upon looking at that case, it does not seem to me to be applicable. There the arbitrator, after making a good award as to the matters referred, proceeded to add something for the purpose of enforcing the performance of certain works, and the Court merely determined that the latter part might be rejected as surplusage. In that case the unsound parts were cut out of the award, but that cannot be done in the case before us. Four actions were referred to the arbitrator, and also all matters in difference between the parties. One of the matters in difference was an action of ejectment which was pending between two of the parties, and as to that no award has been made. This is somewhat similar to the case of *Auriol v. Smith*(i). *Addison v. Gray*(k) is also an authority to shew that, in some cases, an award may be good as to part although bad as to another part.

BOSANQUET, J.—I am reluctantly compelled to say that I am of the same opinion.

COLTMAN, J.—There are some cases where an award may be good in part, but that is where the subject matter is severable. *Doe d. Williams v. Richardson*(l) was a case of that description. *Aitchison v. Cargey*(m), also shews that if an arbitrator exceeds his authority, in certain cases the excess may be treated as surplusage.

Rule absolute.

(g) 3 Russ. 494.  
 (h) 2 B. & Ado. 295.  
 (i) 1 Turn. & Russ. 128.

(k) 2 Wils. 293.  
 (l) 8 Taunt. 697.  
 (m) 13 Price, 639.

Nov. 4.

Ex parte DAVIES.

The Court will amend a writ of *habeas corpus* which was erroneously tested in the reign of *Victoria* instead of 7 Wm. 4.

TALFOURD, Serjt., applied for leave to amend a writ of *habeas corpus*, which had been sued out during the last vacation, bearing date the last day of *Trinity Term*, and tested 1st *Victoria*, instead of 7 Wm. 4. The sheriff returned the writ, and it was doubtful whether the mistake would not vitiate the proceedings if not corrected. *Morris v. Herbert*(a). *Wakeling v. Watson*(b).

TINDAL, C. J.—We take judicial notice that her majesty had not ascended the throne at the time the writ bears date. The amendment may be made.

Rule granted.

( ) 1 Price, 245.

(b) 1 Cr. & J. 467.

## CORBIN v. HEYWORTH.

Nov. 16.

A RULE nisi, had been obtained for judgment, as in case of a nonsuit, for not proceeding to trial, upon an affidavit which stated that notice of trial had been given.

*F. V. Lee* shewed cause, and objected that it did not sufficiently appear that the cause was at issue, and that it ought to have been expressly shewn that it was at issue. He cited *Smith v. Parslow(a)*.

*Keating* contended that, as notice of trial was given, it did appear that the cause was at issue; in the case cited, there was no statement of that fact.

TINDAL, C. J.—I think the affidavit is sufficient.

Rule discharged on a peremptory undertaking.

(a) 2 Cr. & J. 217; 1 Dow. 308.

In a motion for judgment as in case of a nonsuit for not proceeding to trial, the affidavit is sufficient if it states that notice of trial was given, without stating that the cause was at issue.

## SMITH, administratrix of SMITH v. the FESTENIOG Railway Company.

Nov. 7.

COVENANT for breach of a contract made between the testator and the defendants. The contract stipulated that, upon the completion of seven-eighth parts of a railway, the testator should receive a certain sum of money. Breach—That seven-eighth parts of the work had been completed, but that the defendants refused to pay the sum mentioned in the contract. Other breaches were assigned which are not material. Pleas—1st, that seven-eighth-parts of the railway were not completed. 2nd, that the defendants paid the testator the sum which they agreed to pay for seven-eighth parts of the railway.

By the consent of the parties it was ordered, at Nisi Prius, that the jury find a verdict for 5000*l.*, subject to be reduced or vacated, and instead thereof a verdict for defendant, or a non-suit entered, according to an award to be made by a barrister; and it was also ordered, that the costs of the cause and reference, so far as regarded the cause, should abide the event and determination of the award so far as regarded the cause, and that the residue of the costs of the reference should be in the discretion of the arbitrator.

The arbitrator, by his award, directed that, on the first issue, a verdict for the plaintiff should be entered with one shilling damages; and, on the second issue, with 1*s.* 4*d.* damages. He also directed how the verdict should be entered on the other issues.

An action of covenant, in which the pleas had raised several issues upon one breach of covenant, was referred to arbitration, and the arbitrator instead of stating the sum for which the verdict should be entered, awarded separate damages on each issue. Held, that the award was good.

*Cowling*, on the part of the defendants, moved to set aside the award on the

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ground that it was uncertain, and did not follow the submission. The arbitrator ought to have awarded a certain sum in satisfaction of the breach of the covenant, and not separate sums upon the issues which were raised upon the breach. The verdict would then be entered for the sum so awarded. He cited *Martin v. Burge*(a).

TINDAL, C. J.—Why may not the verdict be entered for 14s. 4d.? The arbitrator has chosen to direct a small sum to be entered on each issue, but I cannot think the award is bad upon that ground. It would be straining the law to get rid of the justice of the case, if we acceded to the argument.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule refused.

(a) 4 A. & E. 973.

Nov. 24.

### DOWNTON v. STYLES.

In applying for an attachment against an attorney, it is sufficient since 7 W. 4, and 1 Vict. c. 56, s. 4, to describe him as an attorney at law, without shewing him to be on the rolls of the court to which the application is made.

A RULE *nisi* had been obtained for an attachment against the defendant's attorney, for non-performance of an order of this Court.

*R. V. Richards* shewed cause, and objected that it did not appear by the affidavit upon which the rule was obtained, that the party was an attorney of the court. It merely stated that he was "an attorney at law."

*Best*, who appeared in support of the rule, relied upon the stat. 7 W. 4. and 1 Vict. c. 56, sec. 4, which enacts that an attorney may practise in all the courts of law, although he may not have been admitted an attorney thereof, "provided always that any solicitor practising in any court of law or equity shall be subject to the jurisdiction of such court, as fully and completely, to all intents and purposes whatever, as if he had been duly admitted an attorney or solicitor of such court (a)."

TINDAL, C. J.—That puts an end to the objection.

VAUGHAN, J., BOSANQUET, J., and COLTMAN, J., concurred.

Rule discharged on the merits.

(a) See *Prior v. Smith*, 1 W. W. & Hodges, 65.

## GOULD and others v. OLIVER.

Nov. 25.

**DEMURRER** to a plea in assumpsit. The second count of the declaration stated, that the plaintiffs, before and at the time of the happening of the damages and losses thereafter mentioned, were the owners and proprietors of certain merchandize and chattels, to wit, twenty-six pieces of timber then being in and on board a certain ship or vessel of the defendant, and laden and placed on the deck thereof, to be carried and conveyed therein, on freight payable to the defendant in that behalf, for a certain voyage, whereon the said ship was then proceeding, to wit, from *Quebec* to *London*; that before and at the time of the loading of the said pieces of timber, in and on board the said ship, there had been and was a certain ancient and laudable custom used and approved of, touching and concerning the loading of timber in and on board ships or vessels trading between *Quebec* aforesaid and *London* aforesaid, and employed in carrying timber from *Quebec* aforesaid to *London* aforesaid, that is to say, that the owners of such ships or vessels have had, and have been used and accustomed to have, and of right have had and still of right ought to have, for themselves and their servants, the liberty and privilege of loading and placing on the deck of such ships, a reasonable part of such timber as they from time to time respectively are employed to bring from *Quebec* aforesaid to *London* aforesaid; that the said ship, in this count mentioned, at the time of the happening of the damages and losses in this count mentioned, was a ship or vessel trading between *Quebec* aforesaid and *London* aforesaid, and employed in carrying timber from *Quebec* aforesaid, to *London* aforesaid; and the said twenty-six pieces of timber so laden and placed on the deck of the said ship, then was a reasonable part, in that behalf, of the timber which the defendant was then employed to carry in that voyage, by the said ship, from *Quebec* aforesaid, to *London* aforesaid; and the said twenty-six pieces of timber were laden by the defendant, on the deck of the said ship, in pursuance of and according to the said custom; that whilst the said ship was sailing on her said voyage with the said last mentioned chattels and merchandize on board, to wit, on &c. by storms, winds, and tempestuous weather, in order to preserve the said ship, it then became expedient and necessary to throw and cast overboard the said chattels and merchandize, being the property of the plaintiffs, of great value, to wit, &c., and the same were then accordingly cast and thrown overboard, and became and were wholly lost to the plaintiffs, and the said ship was, by means of the premises, then saved and preserved, and afterwards to wit, on &c., arrived safely, to wit, at *London* aforesaid, of all which premises the defendant afterwards had notice, and then, in consideration of the last mentioned premises, promised the plaintiffs to pay them so much money, as the defendant, as owner of the said last mentioned ship, and interested in the said freight, was liable to contribute to the said losses and damages, in a general average on request; that the defendant, as such owner of the said ship, and so interested in the said freight, was liable to pay and contribute to the said losses and damages, in a general average, a large sum of money, to wit, the sum of 20*l.*, whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice.

*Plea* to the second count,—that though true it was, that before and at the

Where, by the custom of loading timber, between *London* and *Quebec*, the owners of vessels placed part of the timber on the deck, and on the voyage the timber on the deck was thrown overboard in a storm, to preserve the ship, *Held*, that the owner of the ship, was liable to the owner of the timber, to contribute in a general average.

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time of the loading of the said pieces of timber, in and on board the said ship, there had been, and was the said custom in the second count mentioned, there had not been, and was not any custom, that any contribution and general average should be paid upon the loss and damage of timber, so laden and placed, as in the second count mentioned, and cast and thrown overboard, as in that count also mentioned. Conclusion with a verification.

*Special demurrer* to the plea, assigning for causes, that it was admitted by the plea that such custom existed, and the matter sought to be put in issue by the plea was a conclusion of law, necessarily resulting from such custom; and that no apt, sufficient, or material traverse of fact could be taken upon the matter alleged in the plea.

*Wilde*, Serjt. in support of the demurrer.—It is said in *Price v. Noble*(a), "that the law of average and contribution, had existed for ages before the practice of insurance was known." According to the *Rhodian* law, it was enacted, that all the property on board, should contribute to a loss by jettison. *Park on Insurance*, 202, 7th ed. [*Park*, J.—Schomberg's Observations on the *Rhodian* Law, is a very excellent book.] The question in the present case, is whether there is anything to repel the general rule, that the owner of the goods shall have contribution. In *Simonds v. White*(b), it is said by Lord *Tenterden*, C. J., "The principle of general average, namely, that all whose property has been saved, by the sacrifice of the property of another, shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much on the terms of any particular instrument, as upon a general rule of maritime law." It is true, that where goods are stowed upon the deck, they are said to be excluded from the benefit of a general average; French Ordinance, Liv. 3 Tit. 8, du jet, art. 13; *Ross v. Thwaite*, *Park on Insurance*, 26; *Abbott on Shipping*, 355, 5th ed. But that is put on the ground, that goods so stowed, obstruct the management of the ship, and an exception is made of cases, where usage may have sanctioned the practice. The rule does not apply when the goods are placed on the deck of the vessel by custom. In *Da Costa v. Edmunds*(c), the Court held, that, as against underwriters, the owners of carboys of vitriol, which were thrown overboard from the deck, were entitled to contribution, and Lord *Ellenborough* put it on the ground that there was an usage to carry vitriol on the deck. In the present case it is stated in the declaration, that the goods were stowed on the deck according to a custom.

There does not seem to be any express authority upon the question now before the Court, in any of the *English* reports. In the ordinance of *Lewis XIV.*(d), sec. 33, art. 13, it is said, "There shall no contribution be demanded for payment of such effects as were upon the deck, if they be thrown overboard or damaged by the ejector, allowing the owner his recourse against the master. However, if they are preserved, they shall contribute." And by art. 12, "Effects for which there is no bill of lading shall not be paid, though thrown overboard." In the present case, the owner of the vessel has not been guilty of any neglect or misconduct; and it is upon the ground of carelessness upon his part, that the owners of the other goods have not been compelled to con-

(a) 4 Taunt. 123.

(b) 2 B. & C. 811.

(c) 4 Camp. 142; 2 Chitty, 227.

(d) Vide this ordinance, in "The Laws of the Sea, ancient and modern, 252."

tribute. Accordingly, in *Weskett on Insurance*(e), the rule is thus stated: "Goods stowed upon deck or hanging without board, either with or without the consent of the freighter, or the ship's boat lashed to the side, if, after the lading be completed, and the ship is under way, they are not taken within board, are not entitled to any amends or contribution, though cut away or cast overboard for the general safety, yet shall they be obliged to contribute in case any average has been the means of saving them."—Ordin. of Koningsb. "All goods that lay upon the deck of a ship, if they are thrown overboard or damaged, are not to be paid for; but when they are preserved, they must nevertheless contribute towards the other goods that were flung over, reserving, however, to the owner of them his demand upon the captain."—Ordin. of Hamb.

The Code Napoleon (f) adopts the same principle. In the *French Ordinance*, liv. 2, tit. 1, art. 12, p. 397, it is said, that if there be a known usage to load goods upon the deck, as upon a coasting voyage, the goods below shall be liable to contribution.

*Stephens*, Serjt., *contrà*.—The declaration does not sufficiently allege the existence of a custom; a custom ought to be shewn to have existed from time immemorial. Co. Lit. 110 b.; Bro, Abr. tit. Custom. Nor is the custom alleged in the declaration with sufficient certainty. *Birkley v. Presgrave*(g).

The principal question, however, is, whether goods, placed upon the deck of a vessel, and thrown overboard in a storm, come within the general rule as to contribution. There are many authorities to shew that they do not. Ordinances of *Lewis XIV*, art. 12, 13. *Pardessus Cours de Droit Commercial*(h). *Emérigon*, cap. 12, sec. 42. In *Phillips on Insurance*(i), it is said, "where a shipper agrees that his goods shall be carried on deck he thereby gives up his right to claim contribution if they are thrown overboard." The cases of *Dodge v. Bartol*(k), and *Barber v. Brace*(l), are there cited, and the rule is thus laid down by Mr. Phillips, "It results from these two cases, that goods may be carried on deck, even without the consent of the owner, where the usage of the trade is such, and thrown overboard for the general benefit, without giving the owner of them any claim either against the master, for stowing them in this manner, or against the other shippers for contribution"(m).

The only case which has been referred to on the other side, relates to a coasting voyage made by small vessels. But in long voyages such a rule ought not to apply, because the ground upon which goods on deck cannot have contribution is in consequence of the great peril in which those goods are placed, by reason of being so carried. Common peril is the principle upon which general average is given, but goods upon deck, are in greater peril, than goods which are stowed below. In *Da Costa v. Edwards*, the claim

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(e) Tit. Deck.

(f) Code de Commerce, Liv. II. Tit. 12, 421.

(g) 1 East, 220.

(h) Part IV, Tit. 4, cap. 3, sec. 725.

(i) 2 Phillips on Insurance, 230, Boston.

(k) 5 Greenleaf, 286; Reports in the State of Maine.

(l) 3 Conn. Reports, 9.

(m) But in a previous part of this work, Mr. Phillips says, "But the right to demand contribution may depend upon the particular situation of the thing sacrificed. If goods carried on deck are thrown over, it is held in general, that no contribution can be claimed. The reason given by Valin is, that goods so carried embarrass the navigation of the ship. But he thinks that this doctrine ought to be controlled by the usage



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turned upon the construction of the policy of insurance, and not upon the general law. In the present case, the plaintiffs may have an action on the case against the master for damages; but the question now is, whether he is entitled to contribution against the owner of the vessel.

*Wilde*, Serjt. in reply.—The *Rhodian* law, which was adopted by the *Romans*, and is to be found in the digest of their laws, is the foundation of the maritime law of *England*. By art. 9 of those laws, "Of lightening ships in a tempest," it is said, that "a just computation shall be made of the ship and every thing in it (π)." And arts. 32, 35, 38 and 43, shew that this rule applies to all cases, except where the master is guilty of some misconduct. The laws of *Oberon*, which were instituted by *Richard*, I. adopt the same general rule, art. 8, 9, 32 (o): and they are adopted by *Valin* and *Emerigon*. It appears, that the only thing which was required, was that the goods should be properly laden. If they were, then all the goods were liable to contribute for an average. If they were not, then a remedy was given against the captain. Decked vessels were unknown in ancient times, and certainly not till many centuries after the *Rhodian* laws were framed. There is, therefore, no reason, why goods on the deck, should not be entitled to contribution, in cases where the captain has not been guilty of misconduct in placing them there. As it is the usage to carry timber upon the deck, the captain would not be liable to any action at the suit of the plaintiffs. The owner of the goods would, therefore, be without any remedy, except by contribution. The defendant cannot protect himself by saying, that his servant had improperly loaded the deck.

In *Dodge v. Bartol* (p), it appeared, that the goods which were on the deck, were taken at half freight; and the facts in that case, and *Barber v. Brace*, do not warrant the principle, which is extracted by Mr. *Phillips* the *American* writer on the law of insurance.

Cur. adv. vult.

TINDAL, C. J.—The question upon this record, arises upon the second count of the declaration, in which the plaintiffs declare for contribution against the defendant, the ship-owner, in respect of certain timber of the plaintiffs, which was laden on the deck of the defendants' vessel, to be carried on a voyage from *Quebec* to *London* for freight, to be paid to the defendant; and the plaintiffs state in this count, a certain ancient and laudable custom, touching the loading of timber on board ships, engaged in the said voyage, by which custom, the ship-owners have the liberty and privilege of loading on the decks of their ships or vessels, a reasonable part of the timber which they are employed to carry on such voyage; and the count then alleges, that the timber in question was a reasonable part of the timber which the defendant was employed to carry upon that voyage, "and was laden on the deck of the ship, in pursuance

of the trade; and accordingly that contribution may be claimed for goods thrown overboard from the deck of small coasting vessels, or river craft which usually carry a part of their cargoes on deck. Upon the principle of this exception, if it is the usage of the trade to carry a part of the cargo on deck, a jettison of it ought to be a subject of general contribution. It is accordingly the practice in respect to whaling voyages to adjust upon the principles of general

average, the loss of oil thrown overboard from the deck, where it is carried for a short time after being put into casks, before it can be properly and safely stowed in the hold." Vol. 1, 332.

(π) Laws of the Sea, ancient and modern, 91.

(o) Laws of the Sea, ancient and modern, pages, 132, 135, 162.

(p) 5 Greenleaf's Reports, 286.

of and according to such custom." The defendant pleads to this count, that there is not any custom, that any contribution and general average, should be paid on the loss or damage of timber placed on deck, and cast overboard, to which plea the plaintiff demurs.

It has been urged, in argument, by the defendant, that the custom stated in the second count has been pleaded without sufficient certainty or formality; but as this objection does not arise upon a special demurrer to the declaration itself, we think no objection in point of form can now be taken, and that the allegation, in substance and effect, amounts to a statement of an usage and practice of loading ships generally observed upon the voyage in which the vessel was engaged, and consequently that it must have been known to both the contracting parties, the ship-owner, and the owner of the timber, who must be taken to have entered into this contract with reference to it.

The question, therefore, before us is not whether, generally, the owner of goods laden on deck, which are thrown overboard for the preservation of the ship and the rest of the cargo, is entitled to contribution against the owners of the ship and of the residue of the cargo, but whether, in the special and particular case where the ship-owner has laden the goods on deck, under a privilege reserved to him by the general usage and practice of the voyage, the owner of the goods may claim contribution from such ship-owner; and upon the best consideration we can give to this question, referring, at the same time, to the foreign authorities and to the few decisions which have taken place in our own courts, we think the plaintiff entitled in this case to contribution against the ship-owner.

The general rule laid down by the foreign authorities, and adopted by our own law, is, as is well known, that all goods thrown overboard for the preservation of the ship and cargo, shall be entitled to contribution. Upon this general rule, however, there is engrafted an exception by the foreign writers, "that goods laden on the deck and cast into the sea shall not receive contribution, saving to the owner of the goods, his recourse against the master and ship-owner." Consel del Mare, c. 183; Ordinance, liv. 3, tit. 8, art. 13; Emergon, ch. 12, s. 42; Code de Commerce, art. 421. Now where the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are, indeed, express on that point; Valin, tit. Du Capitaine, art. 12; Consel del Mare, c. 183. And the general rule of the *English* law, that no one can maintain an action for a wrong where he has consented or contributed to the act which has occasioned his loss, leads to the same conclusion.

Unless, therefore, the owner of the timber in this case has a claim for contribution against the owner of the ship, he is without any remedy whatever against any one, but must himself bear the whole of the loss, in consequence of his timber having been thrown overboard for the benefit of all—an inference directly at variance with the general rule above laid down, and indeed contrary to the authority of the foreign writers; for Valin lays it down, that the rule of article 13 does not apply in respect of boats and other small vessels going from port to port, "where the usage is to load merchandize on the deck;" the latter words of which text-writer give the reason for throwing such a case out of the exception, into the general rule for contribution, at least so far as the ship is concerned. As to the authorities in the *English* courts, there is no one

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which states directly that goods laden on deck shall in no case, be entitled to contribution. The question, whenever it has arisen in our courts, has been between the owner of the goods thrown overboard and the underwriter; and the rule generally established seems to have been, that, for goods so laden, the underwriters are not responsible. *Ross v. Thwaites*, Park Ins. 26; *Backhouse v. Ripley*, ib. But in the case of *Da Costa v. Edmunds*, 4 Camp. 142, it was left to the jury to say whether there was a usage to carry on deck goods of the description of those thrown overboard, and the jury having found such usage, the underwriters were held liable. The case now under consideration does not, indeed, arise between the same parties, but it appears to fall within the same principle of decision.

We think, therefore, the judgment on the second count must be for the plaintiffs.

Judgment for the plaintiffs.

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Nov. 25.

This being the last day of the term, *Addison*, from one of the back benches, reminded the Lord Chief Justice that, in the Court of Queen's Bench, on the last day of the term, the motions in the back benches had precedence, and now that this was an open court, he claimed the same privilege on behalf of himself and those who sat near him.

TINDAL, C. J.—In the Court of Queen's Bench that practice depends upon a very ancient custom, but this court has been so recently opened that no such usage can exist.

END OF MICHAELMAS TERM.

A  
D I G E S T  
OF THE  
CASES REPORTED IN THIS VOLUME,  
CONTAINING  
THE DECISIONS OF THE COURT OF COMMON PLEAS,

FROM  
HILARY TERM, 7 W. IV. 1836, TO MICHAELMAS TERM, 1 VICT. 1837, INCLUSIVE.

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ACCORD AND SATISFACTION.—See  
PLEADING, 18.

#### ACKNOWLEDGMENT.

See ATTORNEY, 4.

An acknowledgment by a married woman was duly taken, but through inadvertence the parties did not send the certificate and affidavit to be filed, until two years afterwards, when the Court allowed them to be filed. *Ex parte Stevens*, 13.

#### ACTION.

1. A witness living at Camberwell was subpoenaed by the plaintiff to attend a trial at Guildhall, and the witness stated that he had been previously subpoenaed by the defendant, who had paid him a guinea as conduct-money, and the plaintiff then paid him but one shilling with his subpoena. An action was afterwards brought against the witness to recover costs incurred in consequence of his neglect to attend the trial; and the plaintiff alleged in the declaration that he had paid a reasonable sum with the subpoena. *Held*, that this averment was sufficiently proved, by shewing the payment of the one shilling. *Betterby v. M'Leod*, 44.

2. If, when a cause is called on, a material witness is absent, the attorney is justified in withdrawing the record, and he is not bound to allow the trial to proceed, to take the chance of the arrival of the witness. *Id.*

3. An action on the case was brought against the defendant for negligently and carelessly allowing a new rick of hay to ignite, whereby certain cottages belonging to the plaintiff were burnt. At the trial, the judge, in summing up, told the jury, that it was not sufficient for the de-

fendant to shew that he had acted *bonâ fide*, and had done every thing he had thought best to prevent an accident, but that he must prove that he acted as a prudent, not as a rash man would have done under similar circumstances, and that if they were satisfied the defendant had been guilty of gross negligence, the plaintiff was entitled to a verdict. *Held*, that this direction was correct, and a verdict which had been found for the plaintiff, was ordered to stand. *Vaughan v. Menlove*, 51.

ADMINISTRATION BOND.—See PRACTICE, 12.

ADMINISTRATOR.—See EXECUTORS.

#### AFFIDAVIT.

See EJECTMENT, 4, 5. PRACTICE, 19.

1. An affidavit of debt stated that the defendant was indebted to plaintiff, for materials found and provided, goods sold and delivered, and work and labour done and performed by the plaintiff, to and for the use of the defendant. *Held*, that the latter allegation had reference to the whole of the items, and that the affidavit was not defective. *Lucas v. Goodwin*, 32.

2. An affidavit to hold to bail for money due from the defendant on the balance of an account stated, is sufficient, without stating that the account was stated and settled. *Tyler v. Campbell*, 79.

#### AGREEMENT.

See ATTORNEY, 3. CONTRACT. COVENANT, 2, 3. VENDOR AND VENDEE, 1.

An agreement for the lease of a house contained the following clauses: "and the

said T. D., [the lessee,] doth hereby agree to spend, within one year from the date thereof, 200*l.*, at the least, in erecting a kitchen to the said messuage, and also in altering the large room into two or more rooms, or in such other repairs as may be necessary to make the same fit for habitation, such erection and alterations or repairs, to be inspected and approved of by the said W. K., [the lessor,] and to be done in a substantial manner; and it is agreed that the said T. D. shall be allowed 200*l.* towards such erection and alterations or repairs, and shall be at liberty to retain the same out of the first year's rent of the said premises." The lessee laid out more than 200*l.*, but the lessor did not approve of all the work, and distrained for the balance of the first year's rent. *Held*, in an action brought by the lessee for an excessive distress, that the approval of the lessor was not a condition precedent, and that after the jury had found that 200*l.* was expended by the plaintiff in substantial repairs, he was entitled to recover in the action. *Dallman v. King*, 283.

### ARBITRATION.

See COSTS, 2. INCLOSURE ACT. PLEADING, 25.

1. An action of covenant, in which the pleas had raised several issues upon one breach of covenant, was referred to arbitration, and the arbitrator, instead of stating the sum for which the verdict should be entered, awarded separate damages on each issue. *Held*, that the award was good. *Smith v. Festenig Railway Company*, 305.

2. Where an arbitrator was empowered to state facts, on his award, for the opinion of the Court as upon a special verdict, the Court sent the award back to be amended, on the ground that the arbitrator had not found an important fact with sufficient precision. *Ferguson v. Norman*, 241.

3. Four actions between distinct parties, and all differences, were referred to arbitration; but the arbitrator did not notice or dispose of a fifth action which was pending; and, although it was a matter in difference and was brought before the arbitrator. *Held*, that the award was altogether bad, although the arbitrator had directed that mutual releases should be given by the parties. *Stone v. Phillips*, 302.

4. A judge has power, under the Rule of Hilary Vacation, 1834, to certify that a cause was proper to be tried before him, and not before the judge of an inferior court, where the action is referred at nisi prius to arbitration. *Bruggeffe v. Hawke*, 223.

5. A bond of submission recited that certain disputes, relating to building a house, had been agreed to be referred to arbitration, and that the arbitrators should determine all claims relating

to alleged defects and imperfections in the materials and workmanship, and likewise relating to the accuracy of the claims for extra work and deductions for omissions; and to ascertain what balance, if any, was due to the builder, in respect of such extras and omissions: the costs to abide the event of the award. The arbitrator awarded that 296*l.* should be paid to the builder in full compensation and satisfaction for all the matters in difference. *Held*, that the award was bad, as the first two subjects of dispute were not determined. *In the matter of Rider and another*, 222.

### ARREST.

See AFFIDAVIT, 1, 2. INSOLVENT. PRACTICE, 2.

1. Where no application was made to discharge a defendant out of the custody of the sheriff on the ground of a defect in the affidavit to hold to bail, until twenty-one days after the arrest, *held*, to be too late, and that the extreme age and infirmity of the defendant was no sufficient excuse for the delay. *Daly v. Mahon*, 261.

2. The defendant was arrested on the 12th of October, and the application for his discharge was made on the 2nd of November. *Held*, too late, and that the application ought to have been made within eight days. *Id.*

### ATTORNEY.

See ACTION, 2. COSTS, 7. SLANDER.

1. In an action on an attorney's bill which was not taxable, a verdict was taken for the plaintiff by consent, subject to a taxation of the bill before the fifth day of the next term. The defendant, instead of taxing the bill, applied for a new trial, and caused the taxation to stand over until after the fifth day of the term. *Held*, that the plaintiff was not bound afterwards, to submit his bill to taxation. *Tucker v. Neck*, 242.

2. In applying for an attachment against an attorney, it is sufficient, since 7 W. 4, and 1 Vict. 4, c. 56, s. 4, to describe him as attorney at law, without shewing him to be on the rolls of the court in which the application is made. *Downton v. Styles*, 306.

3. A tenant for life, entered into an agreement to let an estate to the defendant; and the agreement, which was executed by the parties, at the office of the plaintiff, who was the intended lessor's attorney, stipulated that a lease and counterpart should be prepared by the attorney, at the expense of the defendant. The tenant for life died, after the lease was prepared, but before it was executed. *Held*, that the defendant was liable to pay the attorney half the costs of drawing the agreement, and the costs of an ab-

tract of title, lease, and counterpart. *Webb v. Rhodes*, 138.

4. Charges in an attorney's bill for drawing and enrolling the certificate of an acknowledgment, made by a married woman, and for fees paid on enrolment, under the Fines and Recoveries' Act, (3 & 4 W. 4, c. 74,) do not render the bill taxable within 2 Geo. 2, c. 23. *Ex parte Bransom*, 132.

5. A charge by an attorney for searching for an old judgment, and advising his client as to the propriety of reviving it, is not a taxable item under 2 Geo. 2, c. 23. *Ex parte Rice*, 130.

6. Where an attorney who had money belonging to his client, to invest on mortgage, examined the title of one who desired to borrow money on mortgage; it was held, that the relation of attorney and client existed, and that the communication was privileged, although no money was lent, and the attorney made no charge for examining the title. *Doe d. Thomas v. Watkins*, 25.

AVERAGE.—See INSURANCE.

AWARD.—See ARBITRATION.

## BAIL.

See AFFIDAVIT, 1, 2.

1. The Rule Trin. 1 Will. 4, s. 5, which requires that bail shall not be changed without the leave of a judge, applies to cases where the other bail justify, in consequence of the rejection of the first bail. *Vestris's bail*, 129.

2. Where a defendant pleaded an issuable plea, after the plaintiff had taken an assignment of the bail-bond, and the bail gave notice that the plaintiff was at liberty to proceed with the trial of the cause; and the bail was afterwards perfected in time to try at the second sittings in the term, provided the defendant accepted short notice of trial; *held*, that the bail-bond ought not to stand as a security, under R. H. T. 2 Will. 4, V. *Clark v. Vestris*, 133.

3. In an action against the acceptor of a bill of exchange, it is no objection to bail that he is the drawer of the bill. *Beesley's bail*, 15.

## BANKRUPT.

See COSTS, 1.

1. A. and B., who were traders in embarrassed circumstances, directed one of their shopmen to remove large quantities of goods to his lodgings, and to sell them at 25 per cent. under prime cost. The shopman called on the defendants and offered the goods for sale, without disclosing the names of his employers, but stating that the

owners were in want of money. The defendant called at the lodgings and made several large purchases, paying the shopman for each parcel in cash, and deducting the discount. A fiat in bankruptcy issued, and the assignees brought trover to recover these goods. The jury found that the bankrupts intended to defraud their creditors, and that the defendants had not made such inquiries as honest and prudent men would have done. *Held*, that the assignees of the bankrupts were entitled to recover back the goods sold both before and after the commission of the act of bankruptcy, and that the case was within the 82nd sect. 6 Geo. 4, c. 16. *Devas v. Venables*, 9.

2. A., as principal, and B., as surety, became jointly and severally bound to the plaintiffs; and the condition of the bond was, that A. should pay the first year's interest of the money lent, on the 1st March, 1833; and the third year's interest, with the principal sum, on the 1st March, 1835. A. did not pay the first year's interest until the 30th of March, 1833. B., the surety, became bankrupt in June, 1833, and obtained his certificate in August, 1833. A. not having paid the principal sum in March, 1835, B. was sued on the bond, and he pleaded his certificate in bar:—*Held*, that the bond was forfeited before the bankruptcy, and that the subsequent payment of the interest did not waive the default: that the debt was therefore provable against the estate of B., and that his certificate was a bar to the action. *The Skinner's Company v. Jones*, 18.

## BILL OF EXCEPTIONS.

1. A bill of exceptions will lie from a judgment in the county court. *Strother v. Hutchinson*, 294.

2. And it will lie where the plaintiff was nonsuited, after he had appeared and refused to submit to a nonsuit. *Id.*

3. A *venire de novo* cannot be awarded to a county court. *Id.*

## BILL OF EXCHANGE.

See BAIL, 3. PLEADING, 8, 9, 10, 11, 12, 13. PRACTICE, 4. PUBLIC COMPANY.

1. In an action on a bill of exchange by the indorsee against the acceptor, with a count for interest and on an account stated, the defendant pleaded that a second bill was drawn and accepted in full satisfaction and discharge of the first bill, and that the second bill was duly paid. It was in evidence that the first bill remained in the hands of the indorsee, and that the acceptor had acknowledged that interest was due in respect of it, whereupon the jury returned a

verdict for the amount of the interest, notwithstanding the defendant proved that the second bill had been paid. *Held*, that the verdict ought to stand. *Lumley v. Blugrave*, 247.

2. Where the witness met the drawer of a bill at the theatre, the evening that it became due, and asked him whether he had heard of the dishonour of the bill, and he replied that he had, and intended to call and pay it, it was held that the defendant could not object that he had no notice of the dishonour of the bill. *Norris v. Salomonson*, 14.

3. In an action on a bill of exchange by indorsee against indorser, the defendant pleaded that he did not have notice of the presentment of the bill to the acceptor, and of the non-payment thereof; and issue thereon. *Held*, that proof of the delivery of the following letter from the plaintiff to the defendant, was insufficient to sustain this issue. "The promissory note for 200*l.* drawn by H. S., dated the 18th of July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount forthwith." *Boulton v. Welch*, 77.

**BOND.**—See **BANKRUPT**, 2. **PRACTICE**, 12.

### CHARTER PARTY.

See **PLEADING**, 5.

A ship was chartered to proceed to Rio Nunez, and take on board a full and complete cargo of lawful merchandize, freight to be paid upon certain enumerated articles, according to the terms mentioned in the charter-party, "all or either at the option of the charterer," the charterer to have the liberty of filling up the vessel at St. Mary's. The charterer put on board about one-seventh of a cargo of the goods enumerated at Rio Nunez, and about the same quantity at St. Mary's, and at the latter place the cargo was completed with eighty-four loads of teak wood, which was not an enumerated article, at 4*l.* per ton. It appeared that the charterer paid for the whole freight 593*l.*, but that a cargo consisting of average quantities of all the enumerated articles, would have produced 668*l.*, whilst a cargo of palm oil, one of the enumerated articles, would only have produced 452*l.* *Held*, that the plaintiffs were entitled to recover freight to the amount of 668*l.*; and that the charterer did not fill up a full and complete cargo of lawful merchandize. *Copper and others v. Forster*, 177.

**CONDITION PRECEDENT.**—See **AGREEMENT**.

**CONSIDERATION.**—See **CONTRACT**. **PLEADING**, 6, 13, 18.

### CONTRACT.

See **AGREEMENT**, 1. **EXECUTORS**, 4. **BANKRUPT**, 1. **CHARTER PARTY**. **COVENANT**, 2, 3. **PLEADING**, 6, 7, 18. **PRINCIPAL AND AGENT**, 1, 2. **TENDER**, 1. **VENDOR AND VENDEE**, 1, 2. **WAGERS**, 1, 2.

Where B. had issued execution against the goods of A., his debtor, C. came forward, and agreed to pay B. and all the other creditors of A., upon having an assignment of his effects; and, in pursuance of this agreement, A. gave a bill of sale of his effects to C., and B. withdrew his execution. *Held*, that this raised a new contract between B. and C., and that the former might sue the latter for the amount of the debt originally due from A. *Bird v. Gammon*, 224.

**COPYHOLD.**—See **HERIOT**. **MORTGAGE**, 1, 2, 3.

### COSTS.

See **ATTORNEY**, 1, 4, 5. **OUTLAWRY**. **PRACTICE**, 20.

1. After joinder in demurrer the plaintiff became bankrupt, and afterwards obtained his certificate. The defendants applied for security for costs, but it being shewn that the assignees did not intend to interfere with the action, and that it was continued for the benefit of the bankrupt, the Court refused the application. *Beckum v. Knight*, 301.

2. The defendant put a construction on an award, which induced the plaintiff to move to set it aside. The Court decided that the defendant's construction was not correct, and the rule was therefore discharged, as the objection did not then arise. *Held*, that the prothonotary was correct in taxing the costs of the rule for the defendant, according to the usual practice. *Hocken v. Grenfell*, 251.

3. The rule of Hilary Vacation, 1834, as to the taxation of costs on the reduced scale, does not apply to actions brought for unliquidated damages, where less than 20*l.* is awarded on a writ of inquiry. *Croft v. Miller*, 230.

4. In trespass for breaking a close, the defendant pleaded, 1st, not guilty; 2nd, that all the king's subjects had a right of way over the *lens in quo*, to carry goods and water; and 3rdly, a similar right limited to the inhabitants of M.—. The jury found for the plaintiff on the first and second issues, and for the defendant on the third

issue, so far as it related to the carrying of water only. *Held*, that this verdict was substantially in favour of the defendant, and that he was entitled to the general costs of the cause, including the costs of those witnesses who proved the defendant's claim as to the carriage of water, but disproved it as to the carriage of goods. *Knight v. Woore*, 1.

5. The costs given to a plaintiff in ejectment against a mortgagor, after payment of the mortgage money, under 7 Geo. 2, c. 20, are taxed costs as between party and party. *Doe d. Capps v. Capps*, 136.

6. A defendant in custody for twelve months for the nominal damages in ejectment, and for costs beyond twenty pounds, is entitled to his discharge under 48 Geo. 3, c. 123. *Doe d. Daffey v. Sinclair*, 145.

7. Interlocutory costs payable to a plaintiff may be set off, under H. T. 2 Will. 4, c. 93, against the costs of a judgment of non-pros in defendant's attorney's lien. *Holliday v. Lawes*, 130.

8. After a writ of summons was issued, but before it was served, the defendant paid the plaintiff the debt, but afterwards refused to pay the costs of the writ; whereupon the plaintiff's attorney delivered a declaration, and proceeded with the action. The Court ordered the proceedings to be stayed on payment of the costs of the writ, but refused to make the defendant pay the costs of the declaration. *Willie v. Phillips*, 82.

9. The plaintiff declared in covenant for two quarters' rent in arrear, and the defendant pleaded *riens en arriere*. Upon demurrer the plea was held bad, and after judgment for the plaintiff, he obtained a judge's order for leave to amend the declaration on payment of costs, by withdrawing the claim of one quarter's rent. The defendant afterwards applied to set aside the order, upon the ground that he ought to be allowed the costs of the demurrer; *held*, that he was not entitled to those costs. *Baden v. Flight*, 240.

COUNTY COURT.—See BILL OF EXCEPTIONS, 1, 2, 3. FALSE JUDGMENT.

### COVENANT.

See PLEADING, 18, 19.

1. Where a canal company, empowered by act of parliament to raise money at interest, upon the credit of the undertaking and the rates or duties thereof, and the company, by a deed-poll under their common seal, assigned their property in the undertaking, and the rates and duties thereof, until a sum of money should be paid with interest, to be paid half-yearly, on certain days which were specified; *held*, that an action of

covenant could not be maintained against the company to recover an arrear of interest due under a deed-poll. *Pontet v. Basingstoke Canal Company*, 46.

2. Demise of a mill, together with the use of the stream of water running or flowing in the stream, excepting such part of the said stream as should be sufficient for the supply of such persons as the lessors had then already contracted, or should at any time thereafter contract, to supply with water. "Provided nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof, twelve hours at least in each and every day of the said term." *Held*, that this did not amount to an absolute undertaking to supply water to work the mill twelve hours a day, but that it was a demise of the mill, as the water was flowing at the time of the demise. *Blatchford v. The Mayor, &c., of Plymouth*, 86.

3. The lessors covenanted that the lessee should enjoy the mill and stream without interruption by them, or by persons claiming under them, or by their acts or procurement; the lessee alleged as a breach, that the defendants drew and took, and caused and procured to be drawn and taken, from the stream, divers quantities of water, and interrupted the lessee in the use of the mill; the evidence was, that the water was taken away by persons who claimed a right under contracts made by the lessors before they granted the lease of the mill and stream. *Held*, that the breach was improperly assigned. *Id.*

CUSTOM.—See INSURANCE. HERIOT.

DEVISE.—See WILL.

DISTRINGAS.—See PRACTICE, 1.

DOCK DUES.—See EAST INDIA COMPANY.

### DRAMATIC PERFORMANCES.

The plaintiff wrote the English words for the representation of Weber's opera of Oberon; and the defendant afterwards caused other words to be adapted to the same music, and produced the opera at his theatre; but, in the course of representation, the performers introduced several of the plaintiff's songs instead of the new version. In an action brought by the plaintiff against the defendant to recover the penalty given by the 3 & 4 W. 4, c. 15, s. 2, the jury found a verdict for the plaintiff; and, upon a motion for a new trial, *held*, first, that the question as to what was a representa-



tion of a dramatic production in contravention of the statute, is a question for the jury; and, secondly, that the facts which were proved at the trial warranted the verdict. *Planché v. Braham*, 288.

### EAST INDIA COMPANY.

The East India Dock Act provides for a return of dock duties to such of the East India Company's ships as have completed "their regular number of voyages." *Held*, that this refers to the last voyage, being more than six, which is made by any ship. *East India Company v. Baker*, 171.

### EJECTMENT.

See *Cests*, 5, 6. *EVIDENCE*, 2. *MORTGAGE*, 1, 2.

1. Where there were four tenants in possession, and personal service of the declaration in ejectment had been effected on three of them, but an irregular service on the fourth; judgment against the casual ejector was granted against the three who had been duly served. *Doe d. Mingay v. Roe*, 239.

2. Where a declaration in ejectment directed the tenant to appear in Michaelmas Term, but judgment against the casual ejector was not moved until Hilary Term, the rule for such judgment is nisi only. *Doe d. Thring v. Roe*, 13.

3. Where the date of a declaration in ejectment was wrongly stated, but the notice at the foot was correct, the Court granted a rule for judgment against the casual ejector. *Doe d. Phipps v. Roe*, 33.

4. In moving for judgment against the casual ejector, it appeared that the tenants in possession of the premises expressed their knowledge of the intent and meaning of the declaration in ejectment which was served upon them. *Held*, that it was unnecessary to shew that the declaration and notice were read over and explained. *Doe d. Stone v. Roe*, 14.

5. On a motion for judgment against the casual ejector, the affidavit of the service of the declaration and notice ought to state that it was explained to the tenant; it was not sufficient to say it was read over. *Doe d. Wade v. Roe*, 210.

**ESTOPPEL.**—See *MORTGAGE*, 3.

### EVIDENCE.

See *ACTION*, 1, 2. *ATTORNEY*, 6. *LIMITATION, STATUTES OF*, 2. *PLEADING*, 3. 8. 21.

1. In an action for money had and received,

brought by a ship-owner against his captain, the plaintiff offered evidence of the payment of a bill of exchange drawn by the defendant in a foreign port, in favour of a broker, on account "of disbursements for the ship." There was evidence that the ship had undergone some repairs in the port. *Held*, that proof of the payment of the bill was inadmissible in this form of action, in the absence of evidence that the money had ever come to the defendant's hands. *Scott v. Miller*, 169.

2. In ejectment, the lessor of the plaintiff claimed as heir-at-law of one Bath, though a younger son. The defendant, who claimed an interest in the premises, set up as a defence, that the true heir of Bath was the grandson of his eldest son, and that he was then living; and to prove this, the grandson was called by the defendant as a witness. *Held*, that he was a competent witness. *Doe d. Bath v. Clarke*, 48.

3. On an action by a horse-dealer for the recovery of the price of a horse, which had been bequeathed to the defendant, and which he had sold after the death of the testator, *held*, that under 3 & 4 W. 4, c. 42, s. 26, the executor and residuary legatee was a competent witness to prove that the horse had never been sold by the plaintiff, but was merely sent upon trial to the testator. *Bowman v. Willis*, 137.

4. Where the defendant was charged with a fraudulent design to induce the plaintiff to build some houses upon the credit of his son, evidence was given that the defendant had represented that he and his son were entitled to receive some money from America, and that the Stamford Mercury contained an advertisement, which required them to go to a certain place to receive the legacy. *Held*, that a copy of the Stamford Mercury of a date which corresponded with the time when the representations were made, and which contained such an advertisement, was receivable in evidence. *Lucas v. Godwin*, 114.

5. Under the Interrogatories' Act, (1 Will. 4, c. 22,) the Court gave the parties a mutual power to cross-examine witnesses in Paris and Boulogne, *vid. voc.*, and directed that the cross-examinations should be taken down in writing, and return with the commission. *Pole v. Rogers*, 83.

6. Upon an issue whether an administratrix had assets at the commencement of the suit, the plaintiff proved that the intestate, twelve months before his death, had purchased certain furniture, which was seen, after his decease, in a house where he lived with the defendant, his sister. The defendant proved, that he was merely a lodger in the house. *Held*, that there was *prima facie* evidence of the possession of assets. *Britton v. Jones*, 82.

## EXECUTORS AND ADMINISTRATORS.

See EVIDENCE, 6. PRACTICE, 12.

1. An administrator appointed *pendente lite*, is entitled to call upon the late attorney of the deceased to deliver up deeds and papers belonging to the deceased, which are in his possession. *Esporte Du Fair*, 135.

2. The attorney of one who had a claim on a deceased person's estate, wrote a letter to the executrix, in which he stated that the creditor did not claim the debt from her as executrix, but that he claimed it from her individually, she having paid the interest from time to time. The executrix afterwards died insolvent, and it was held that this letter did not release her from her liability as executrix. *Richards v. Browne*, 27.

3. A testator bequeathed certain goods to his executrix for life, with remainder to B. absolutely. The executrix used the goods during her life; and, after her death, her executor permitted B. to receive them. The executor of the executrix was afterwards sued for a debt due from the testator who had bequeathed the goods, which the executrix had neglected to discharge. *Held*, that she had not been guilty of a *devastavit* in her life-time, and that her executor ought to have discharged the debt by selling the goods. *Id.*

4. A relative of a deceased lady ordered the plaintiff, an undertaker, to perform a funeral which was suitable to her rank; and her son, many months before he took out administration to the deceased's effects, wrote a letter to the relative who ordered the funeral, in which he expressed his approbation of all that had been done. In an action against the deceased's son, charging him, as administrator, for the expenses of the funeral, it was held, that the action was maintainable. *Lacey v. Walrond*, 215.

## FALSE JUDGMENT.

Upon a writ of false judgment from a county court, the sheriff returned a mere transcript of the proceedings which had taken place in the court below, so that it did not appear whether it had jurisdiction to try the cause, whereupon the Court remanded the transcript to be amended. *Overton v. Sweettenham*, 142.

FRAUD.—See BANKRUPT, 1.

FRAUDS, STATUTE OF.—See VENDOR AND VENDEE, 1.

FREIGHT.—See CHARTER PARTY.

## GAME.

1. A deputation to kill game, granted before the 1 & 2 W. 4, c. 32, does not continue in force so as to entitle a gamekeeper in an action for an act done by him after that act was passed, to have a notice of action, and to give all matters in evidence under the general issue. *Bush v. Green*, 265.

2. The 1 & 2 W. 4, c. 32, s. 1, repeals all former game acts, "except as to any matters done by any persons, under the authority of the said acts, before the 31st Oct., 1831, with respect to which every privilege and protection given by any of the said acts shall continue in force as if this act had not been made. *Held*, that the granting of a deputation was not a matter done within the meaning of this exception. *Id.*

GAMING.—See WAGERS, 1, 2.

GUARANTEE.—See SET-OFF.

HABEAS CORPUS.—See PRACTICE, 3.

## HERIOT.

By a custom in the manor of P. upon every descent, the lord was to have for an heriot the best quick cattle of the tenant, and in default of such cattle, the best household stuff or goods. By another custom, if any customary tenant should let his land, "and at his death the lord has not been answered the best beast for his heriot which did commonly manure the premises for one year before his decease," then the lord was to be paid 40s. instead of a heriot. *Held*, that where a customary tenant had let his land and afterwards died, the lord could not seize the best beast for his heriot, but that he was bound to take the 40s. in lieu thereof. *Croome v. Guis*, 277.

HUSBAND AND WIFE.—See PLEADING, 20.

## INCLOSURE ACT.

By an inclosure act, commissioners were empowered to divide and allot certain open and common fields among the proprietors thereof; and it was declared, that the several fields so to be allotted, should be in lieu of and in full satisfaction and compensation of all rights and interests whatsoever, of the persons to whom the allotment was made; and it was declared, that it should be lawful for the commissioners to allot and award any new allotments and old in-

closures, in exchange for any other new allotments or old inclosures within the same parish, or any adjoining parish; so that such exchanges should be set forth in the award, and that they should be made with the consent of the respective proprietors of the land, to be testified in writing under their hands. A power was reserved to parties aggrieved, to appeal to the quarter sessions. The commissioners, by their award, made in 1798, allotted to Sir H. Mildmay, in respect of an estate in the parish, two closes of land, late Mr. Parson's land. They also allotted to the said Mr. Parsons, in respect of his freehold estate, two old inclosures, late Sir H. Mildmay's, called South Stearts; also one allotment of arable land, called Shortlands, late a common field; and the commissioners did thereby consent to, approve of, and confirm the several exchanges made between the said Sir H. Mildmay, and the said Mr. Parsons. It did not appear, that any consent in writing was entered into between the parties; but Parsons entered into possession of the two closes, called South Stearts and Shortlands, and after his death, the trustees under his will contracted, in 1813, to sell the same. *Held*, that the vendors could not, under the award and the act of parliament, make a good title to the purchaser. *Cox v. King*, 119.

### INSOLVENT.

By the 'General Insolvent Act, 7 Geo. 4, c. 57, s. 34, it is enacted, that no creditor shall, after the commencement of the imprisonment of a prisoner, "avail himself of any execution issued or to be issued." *Held*, that where an actual imprisonment within the walls of a prison follows upon an arrest for debt, as one continuous act, within the usual time allowed and required by law, then the arrest must be taken to be the commencement of the imprisonment; but where, after the arrest is made, any delay, not sanctioned by law, takes place before the actual commitment to prison, such as by the favour of the plaintiff, or the negligent or permissive escape of the prisoner, then not the arrest, but the actual coming within the walls of a prison, is the commencement of such imprisonment. *Yopp, Assignee of Parkington, an insolvent, v. Harrington*, 165.

### INSURANCE.

Where, by the custom of loading timber, between London and Quebec, the owner of vessels placed part of the timber on the deck, and, on the voyage, the timber on the deck was thrown overboard in a storm to preserve the ship; *held*, that the owner of the ship was liable to the owner of the timber, to contribute in a general average. *Gould v. Oliver*, 307.

INTEREST.—See BILL OF EXCHANGE, 1.

INTERROGATORIES.—See EVIDENCE, 5.

### INTRUSION.

1. A writ of intrusion may be maintained for an intrusion made after the determination of an estate *pur autre vie*. *Piercy v. Gardner*, 103.

2. A devisee is entitled to sue by a writ of intrusion. *Id*.

3. The limitation for suing out a writ of intrusion is fifty years, under stat. 32 Hen. 8, c. 2.

JOINT STOCK COMPANY.—See PUBLIC COMPANY. COVENANT, 1.

### LANDLORD AND TENANT.

See AGREEMENT. ATTORNEY, 3. COVENANT, 2. PLEADING, 18, 19, 25.

1. A notice to quit was given by an agent who had from time to time received the rent of the estate, and paid the money into a bank to the credit of the landlord, but had always acted upon instructions received from the landlord's immediate agent:—*Held*, that, without some further proof of authority, the notice was insufficient. *Doe d. Rhodes v. Robinson*, 84.

2. In assumpsit, the declaration stated that the defendants had become and were tenants to the plaintiffs, of a brewery, and in consideration thereof, they undertook to repair the same. *Breach*,—that the defendants suffered and permitted the premises to be ruinous and prostrated. A verdict was taken for the plaintiffs, subject to a special case, which stated the following facts:—In 1769, a lease of the premises in question, was made to one Uppon, by a tenant for life, for a term which expired in 1830; and that lease contained a covenant from the lessee to repair the premises. Samuel Sanders became the assignee of the lease, and, in 1795, he made an underlease at an improved rent, and Samuel Sanders, during his life-time and the defendants, after his death, paid the rents reserved in the lease of 1769, until 1827; and received the improved rent, payable under the lease of 1795, until 1830. The plaintiffs, were assignees of the reversion, and in 1830, the premises were in a very dilapidated state; but it was then ascertained, that the lease of 1769 was void, because the tenant for life had exceeded his power of leasing. *Held*, first, that as all the parties had treated the lease as being valid, the defendants were bound by the terms of it, and that they were liable to pay such an amount of damages, as would be sufficient to put the premises in re-

pair, at the expiration of the term; and that the declaration disclosed a sufficient consideration to support the promise; also, that the defendants were liable to pay the rent reserved in the lease of 1769, until its expiration, but that they were not liable for rent or dilapidations after 1830. *Beale v. Saunders*, 147.

3. The defendants, entered into the following agreement:—"That they should become tenants of Botolph Wharf, at 375*l.* a quarter, the tenancy to commence on the 14th of June, they paying a quarter's rent on that day; that they should give security to pay one quarter's rent in advance, as long as they should continue tenants;" and in a bond, given as a security for the rent, it was recited, "That the defendants had become tenants of Botolph Wharf, at the rent of 375*l.* a quarter, and had paid the first quarter's rent, and had agreed to pay the said sum of 375*l.*, on or before the first day of every quarter, during which they should hold the premises." *Held*, that this was a quarterly tenancy. *Wilkinson v. Hall*, 56.

6. Whether a quarterly tenant, who wilfully holds over, after his tenancy is expired, is liable to pay double value to his landlord, under 4 Geo. 2, c. 28.—*Quere. Id.*

LEASE.—See ATTORNEY, 3. COVENANT, 2, 3. LANDLORD AND TENANT, 2. 3. MORTGAGE, 4.

LIBEL.—See PLEADING, 14, 15, 16, 17. PRACTICE, 5, 6.

LIEN.—See COSTS, 7.

## LIMITATION, STATUTES OF.

See INTRUSION, 3.

1. The limitation affecting an action to recover a rent-charge, granted by will, is twenty years from the death of the testator, under the 3 & 4 Will. 4, c. 27, s. 2. *James v. Salter*, 70.

2. Where a debtor wrote a letter to a creditor, respecting a debt for which he was liable, stating that he was very wretched indeed, on account of the account not being paid, and that he heard, that there was a prospect of an abundant harvest, which must very considerably reduce the account, and that if it did not, the concern must be broken up to meet it at last; *held*, that this was a sufficient acknowledgment to take the case out of the Statute of Limitations, (9 Geo. 4, c. 14;) also, that the construction of the letter was properly left to the jury, and that parol evidence was admissible to shew the amount of the debt. *Bird v. Gammon*, 224.

3. Where there is a life interest outstanding in an estate tail, the heir of the grantor who

claims on failure of the estate tail, has twenty years from the death of the tenant for life to bring an action of *formedon in reverter*. *Dummday v. Hughes*, 33.

## MORTGAGE.

See COSTS, 5. STAMP.

1. In ejectment, brought by a mortgagee, against the widow of the mortgagor, the lessor of the plaintiff proved an assignment, by way of mortgage, of copyhold premises, by lease and release, and not by any surrender to the lord. *Held*, that the lessor of the plaintiff had only an equitable interest, and that he could not maintain the action. *Doe d. North v. Harriet Webster*, 203.

2. Where a mortgage of copyhold premises, by lease and release, recited that, by indentures of lease and release, the mortgagor, (a copyholder for lives,) had contracted with the Bishop of Rochester, for the absolute purchase of the inheritance, in fee simple of the copyhold premises, and that the Rishop of R. had granted and released the same, (parcel of the manor of the prebend of W.) to hold the same to the mortgagor, his heirs, and assigns for ever; and the mortgage-deed then witnessed, that the mortgagor granted and released the premises in fee, subject to the usual proviso for redemption. *Held*, that there was no sufficient evidence, furnished by the recital, that there had been any enfranchisement of the copyhold. *Id.*

3. Whether the above recital was evidence, by way of estoppel, against the widow in possession of the mortgage, *quere. Id.*

4. An estate was mortgaged in fee, subject to the usual proviso for redemption, on payment of the principal and interest, on the 5th June, 1834. It was further provided, that the mortgagor should not be entitled to call in the principal money, before December, 1840, if the interest was in the meantime regularly paid; and the mortgage deed contained a covenant, that the mortgagor should hold, occupy, and enjoy the estate, until default should be made in payment of the principal or interest, contrary to the before-mentioned provisos. *Held*, that this amounted to a lease of the premises, by the mortgagee to the mortgagor, until December, 1840. *Wilkinson v. Hall*, 56.

## NEW TRIAL.

1. Upon a question of sea-worthiness in an action on a policy, the jury found a verdict for the plaintiff, and a new trial was obtained, upon the ground that the verdict was against the evidence. Upon the second trial, the verdict was again found for the plaintiff upon the same evi-

dence. *Held*, per *Tindal*, C. J., and *Park*, J., that no further trial ought to be allowed, the verdict not being perverse. *Vaughan*, J., and *Coltman*, J., diss. *Foster v. Steele*, 231.

2. The Court refused to open a consolidation rule, where the cause by which the other defendants were bound had been tried twice upon its merits, and a third trial had been refused, although the verdict for the plaintiff was not altogether satisfactory. *Vaughan*, J., diss. *Foster v. Alves*, 233.

#### NOTICE OF ACTION.—See *GAME*, 1.

#### NOTICE OF DISHONOR.—See *BILL OF EXCHANGE*, 2, 3.

#### NOTICE TO QUIT.—See *LANDLORD AND TENANT*, 1, 2.

#### OUTLAWRY.

Where a plaintiff proceeded to outlawry without endeavouring to find the defendant's residence by applying to persons with whom he knew the defendant was acquainted, it was held, that this was no ground for reversing the outlawry without costs. *Hunter v. Whitfield*, 210.

#### OYER.—See *PRACTICE*, 12.

#### PATENT.—See *PRACTICE*, 9, 10.

#### PLEADING.

See *PRACTICE*, 5, 6, 13, 14, 15, 17, 20.

1. The first count of a declaration set out a contract that the defendants, together with the auctioneer employed, would be responsible for the proceeds of the sale of certain books; the second count, that the defendants alone would be responsible. *Held*, that these counts did not shew a distinct subject matter of complaint, within Reg. 5, Hil. T. 4 W. 4. *Cholmondeley v. Payne*, 80.

2. In trover against a wharfinger, the Court allowed the following pleas: first, not guilty; secondly, that the goods were not the plaintiff's goods; and, thirdly, that they had been deposited with the defendant by a third party, as a security for money advanced. *Jaulerey v. Britton*, 93.

3. In debt under a plea of *nunquam indebitatus*, payment must be pleaded, although the plaintiff has given credit for the sum paid, in the bill of particulars. *Ernest v. Brown*, 79.

4. To a declaration in *assumpsit* for money paid to the defendant's use, &c., the defendant pleaded that the money was paid on account of a certain contract made between the plaintiff and defendant, relating to the purchase of foreign securities, whereon it was agreed that the defendant should repay the plaintiffs all advances made by him on account of the said securities, and should also, upon receiving reasonable notice, pay certain deposits, in case the securities should be depreciated; and that if the defendant neglected to pay such deposits, then the plaintiff should be at liberty to sell the securities, and that the defendant should reimburse the plaintiff any losses occasioned by such re-sale. The plea then averred, that in contravention of this agreement the plaintiff had sold the securities without giving any notice to the defendant to pay advances on deposits. *Held*, upon special demurrer, that the plea was bad as amounting to non-*assumpsit*. *Morgan v. Pebrer*, 3.

5. Declaration in *assumpsit*. On a charter-party in the first count, the breaches assigned were, 1. The omission to supply a cargo. 2. The non-payment of a large sum, to wit, 200*l.*, due for freight. In the second and third counts (*indebitatus assumpsit*) the plaintiff claimed 200*l.* for freight and 200*l.* on an account stated. The defendant pleaded, as to 476*l.* 1*4s.* 7*d.* parcel of the sums of money in the declaration mentioned, payment and acceptance of that amount before action brought. *Held*, that the plea was bad for not shewing specifically to what part of the plaintiff's demands it was pleaded. *Lorymer v. Vizeu*, 38.

6. A contract was made for the sale of a cargo of good merchantable Gallipoli oil, consisting of 240 casks, containing 901 salms and nine pignatelles, at 54*l.* per imperial ton of 7 and 1-5th salms. An action being brought against the defendant for not performing the contract, he pleaded that the said casks containing the oil were not properly seasoned or proper casks for containing good merchantable Gallipoli oil, but were badly seasoned, and unfit and improper casks for such purpose. *Held*, upon demurrer, that the plea was no answer to the action, because it took issue upon that which was not of the essence of the contract, and because the objection went only to a part of the consideration. *Gower v. Von Delsen*, 94.

7. Where a contract stipulated that the plaintiff should be paid for building six cottages, "on the 1st January, 1837, on condition of the work being done in a substantial and workmanlike manner, and to be completed by the 10th of October;" *held*, that after the work was done, and the day of payment had expired, the plaintiff was entitled to recover in *indebitatus assumpsit*, without declaring specially. *Lucas v. Godwin*, 114.

8. In an action on a bill of exchange by indorsee against the acceptor, the defendant pleaded that

the bill was accepted for the accommodation of the drawers, who had indorsed it without consideration; and that certain unlawful wagers and contracts were made between the indorsee and the plaintiff, relating to the then future price of Spanish Cortes bonds, and thereupon it was unlawfully agreed between the plaintiff and the indorsee, that there should not be any actual or *bonâ fide* transfer of the said stock, but that in case the price thereof should be less than a certain price, to wit, 67*l.* 7*s.* 6*d.* for 100*l.* in the said stock, at certain times, to wit, &c., that the said indorsee should pay the plaintiff the difference which might then be between the said respective prices; but that if the price should be more than the said specified price, then the plaintiff should pay the indorsee such difference or excess. The plea then averred, that the bill of exchange was given to the plaintiff as security for the balance which might become due under and by virtue of the said illegal wagers. *Held*, that variance at the trial in the proof of the price of the stock, was immaterial. *Robson v. Falloves*, 41.

9. Debt does not lie by the indorsee of a bill of exchange against the acceptor. *Clowes v. Williams*, 176.

10. In debt on a bill of exchange for 78*l.* 13*s.* 6*d.*, the defendant pleaded payment into court of 5*l.* 3*s.* 6*d.*, and that he was not indebted to the plaintiff to a greater amount in respect of the cause of action in the declaration mentioned. The plaintiff having taken issue on this plea; *held*, that the plea would have been bad on special demurrer, as amounting to *nil debet*, in contravention of the new rules of pleading; but, after a verdict found for defendant, the Court refused to disturb it. *Finleyson v. Muckenzie*, 211.

11. In an action against the acceptor of a bill of exchange, payable to the drawer or his order, the declaration alleged that the drawer indorsed the bill to one S., and that S. delivered it to the plaintiff. *Held*, upon demurrer, that no title to the bill was shewn to be in the plaintiff. *Cunliffe and others v. Whitehead*, 182.

12. In assumpsit by the indorsee against the drawer of a bill, if the declaration does not allege a promise to pay, it is bad on special demurrer. *Henry v. Burbidge*, 16.

13. The declaration stated that H. R. was desirous of obtaining certain deeds deposited with W. B., and that H. R. applied to the plaintiff to accept certain bills for his accommodation, to enable him to endorse the said bills to W. B. as a payment for his interest in the deeds, and H. R. offered to procure the defendants to undertake to deliver the said deeds to the plaintiff on the payment of the bills so accepted; that the bills were accordingly drawn, and H. R. requested the defendants to undertake to deliver the deeds to plaintiff; of all which the defendants had notice; and that thereupon, in consideration of the

plaintiff accepting the bills, the defendant undertook and promised the plaintiff to deliver the deeds to him when the bills should be paid. Averment, that the bills were accepted and duly paid, but that the defendants had not delivered the deeds to the plaintiff in pursuance of their undertaking. *Held*, upon demurrer, that a sufficient consideration appeared to support the defendants' promise. *Tipper v. Bicknell*, 98.

14. In an action for causing a malicious charge of fraud to be made against the plaintiff before a magistrate, the defendant pleaded that he had caused the charge to be made upon and with a reasonable and probable cause; and the plea then proceeded to state what the reasonable and probable cause was, and certain facts and circumstances were stated; upon special demurrer the plea was held bad, on the ground that it was not expressly stated that the defendant had a knowledge of the facts and circumstances at the time when the charge was made. *Delegat v. Higley*, 158.

15. It is an established principle, upon which the privilege of publishing a report of any judicial proceeding is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms, strictly and properly, the legal proceedings; and a remark made by the clerk to the magistrate, forms no part of the proceedings which may be published. *Id.*

16. In an action for publishing a libel, which stated that the defendant had been charged with a fraud before a magistrate, the only justifications which the law admits are, first, that the charge itself was a true charge; or, secondly, that the publication contained a true, full, and faithful account of the proceedings of a court of justice; and if such proceedings are published, the terms of the accusation should be stated, not merely the result of it, because if the terms in which it was preferred were stated, it might carry with it its own refutation or explanation. *Id.*

17. In an action for libelling the plaintiffs in their business of selling a medicine called Morrison's pills, by publishing that the defendants had crushed the self-styled hygeist system of wholesale poisoning, and that several of the scamps and rascals had been convicted of manslaughter; the defendants pleaded in justification that the pills were composed of aloes and gamboge, of a dangerous and poisonous nature, and that by impudent advertisements the plaintiffs had pretended that the pills would cure all diseases if taken in sufficient quantities; and that two of the hygeists had been convicted of manslaughter for administering the pills. *Held*, that the plea was sufficient, although it did not particularly justify the use of the words scamps and rascals; also, that it was no objection that

one of the patients who had died, had taken a less quantity of pills than the hygeist had ordered; and that it was not necessary for the defendants to shew that they had entirely crushed the system. *Morison v. Harmer*, 108.

18. In an action for a breach of covenant in not delivering up a messuage in repair at the expiration of the term, the defendant pleaded, that after the covenant was broken, an agreement was entered into, between the plaintiff and defendant, that in consideration that the defendant had become tenant from year to year, and had promised to repair the premises before the 12th of April, he, the plaintiff, would give time for the reparation, without bringing an action in the meantime, yet that the plaintiff wrongfully commenced the suit before the 12th of April. *Held*, that this plea was bad—first, because it was a plea of an accord executory only, and not executed; secondly, that there was no good consideration laid for the defendant's promise to repair, or for the plaintiff's promise to forbear to sue for the breach of covenant. *Bayley v. Ho-man*, 184.

19. A declaration in covenant on a lease, alleged, that, after the making of the indenture, to wit, on the 25th March, 1836, 66*l.* 5*s.*, for two quarters of a year's rent, ending on the day and year last aforesaid, was due and in arrear, contrary to the indenture. Plea, that no quarter's rent, ending on the said 25th March, was due or in arrear, *modo et forma*. *Held*, upon demurrer, that the plea was bad. *Baden v. Flight*, 141.

20. Trespass for assault and false imprisonment will lie against husband and wife jointly. *Vine v. Saunders*, 291.

21. In trover for a deed, the defendant pleaded that the plaintiff was not possessed of the deed as of his own property. *Held*, that under this issue, the defendant was entitled to shew that the plaintiff delivered the deed to F. for the purpose of enabling F. to raise money, and that the defendant had lent F. a sum of money on the security of an assignment of it. *Owen v. Knight*, 245.

22. In *quare impedit*, the plaintiffs alleged, that they being the majority of proprietors of estates for the time being of the township of B., of right nominated and presented a clerk to be the perpetual curate of the church of B. The defendants pleaded that they being the majority of the proprietors of estates for the time being of the said township, nominated another clerk to the curacy, *without this*, that the plaintiffs were the majority of the proprietors of the estates at the time of the said nomination, *modo et forma*. Replication, that defendants then being such majority of the proprietors of the said estates, did not duly nominate the clerk *modo et forma*. *Held*, that the replication was bad, as it traversed matter alleged in the inducement of the plea instead of joining issue upon the plea. *Earl of*

*Hurrington v. Bishop of Litchfield and Coventry*, 257.

23. In an action by trustees under 3 Geo. 4, c. 126, s. 57, against the renter of turnpike tolls and his sureties, for rent in arrear, the declaration should shew that the agreement, under which the tolls were let, was in writing, and signed by the trustees, or their clerk, or treasurer. *Oldroyd v. Crampton*, 261.

24. But it need not set out all the preliminary steps which are required to render a meeting valid for the letting of the tolls; it is sufficient to state that at a public meeting of the trustees, duly held by virtue of the statutes in that case made and provided, the tolls were duly put up and let by auction, by virtue of the powers, and in the manner directed by the statutes. *Id.*

25. In replevin, the defendant avowed for rent in arrear, and the plaintiff pleaded in bar that, by the demise in the avowry mentioned, the avowant demised and transferred the premises to the plaintiff for all the residue of the avowant's estate, term, and interest in the same, and that the avowant had not, at the time when, &c., or at any time during the demise, any reversionary estate, term, or interest in the same. The defendant rejoined, that, by an award made in an arbitration between the plaintiff and defendant, a power for distraining upon the premises for rent was given to the defendant. *Held*, first, that the plea alleged, with sufficient certainty, that the avowant, at the making of the demise, did not reserve any reversion in himself; secondly, that the rejoinder was insufficient, because it did not appear that the arbitrator had any authority to give the defendant the power of distraining. *Pascoe v. Pascoe*, 188.

## PRACTICE.

See ACKNOWLEDGMENT. AFFIDAVIT. ARREST. ATTORNEY. BAIL. COSTS. EJECTMENT. NEW TRIAL. REGULÆ GENERALES. WARRANT OF ATTORNEY. WRIT OF TRIAL.

### I. PROCEEDINGS TO APPEARANCE.

1. A distringas which issues more than four months after the date of the writ of summons, is irregular. *Abbotts v. Kelly*, 32.

2. Where the plaintiff delivered a true copy of a capias to the sheriff, in pursuance of stat. 2 W. 4, c. 39, s. 4, but the sheriff's officer made another copy, which stated that the writ was issued in the reign of William the Fourth, instead of Queen Victoria. *Held*, that this was an irregularity only, within Reg. 10 Mich. T. 3 W. 4. *Brashour v. Russell*, 242.

### II. AMENDMENT.

3. The Court will amend a writ of habeas

corpus which was erroneously tested in the reign of Victoria, instead of 7 Wm. 4. *Ex parte Davies*, 304.

4. In an action on a bill of exchange, the declaration described the plaintiff as "Henry H. Lindsay." A rule was obtained by the defendant requiring the plaintiff to amend, by inserting his full names; but the cause of the omission being satisfactorily shewn, the rule was discharged. *Lindsay v. Wells*, 97.

5. After judgment for the plaintiff on a demurrer to one of several pleas of justification in an action for a libel, the Court will not allow him to withdraw a replication of *de injuria* to other pleas, which are open to the same objections, and substitute a demurrer. *Delegat v. Highley*, 259.

6. Where there were three counts in libel, and not guilty had been pleaded to the whole declaration, and issues in fact had also been raised, upon pleas to the first and last counts, and judgment had been given for the plaintiff, on a demurrer to a special plea to the second count, the Court allowed the plaintiff to withdraw the first and third counts from the record, on payment of costs. *Id.*

### III. PARTICULARS OF DEMAND.

7. In an action of trespass, where the *locus in quo* was of considerable extent, and related to a right to moor ships, the plaintiff was required to give particulars of the trespass. *Kirwin v. Jones*, 230.

8. The plaintiff sued the defendant for money had and received by the publication of a book on the plaintiff's account. *Held*, that, for the purpose of pleading, the defendant was entitled to inspect an agreement in the plaintiff's possession, which contained the terms upon which the defendant undertook to publish the book. *Charnock v. Lumley*, 244.

9. In an action for the infringement of a patent, the Court will not compel a defendant to give the names and addresses of persons whom, in a notice of objection given under 5 & 6 W. 4, c. 83, sec. 5, he alleges to have used the invention before the patent was granted. *Bulnois v. McKensie*, 251.

10. But where a judge had made two orders requiring the name and address of a person who had used the invention, and the defendant complied with the orders, the Court refused to rescind them. *Id.*

11. The Court may order a further and better notice of objections, under their general jurisdiction, as well as under the statute. *Id.*

### IV. OTHER PROCEEDINGS BEFORE VERDICT.

12. A creditor sued a surety for the breach of an administration bond, given in pursuance of 22 & 23 Car. 2, without obtaining an assignment

of the bond from the archbishop, or his permission to use his name; and the Prerogative Court having refused to allow the bond to be taken to the defendant, who had cravedoyer, this Court discharged a rule to set aside a judge's order, which had been obtained to stay further proceedings in the action, until the bond was brought to the defendant. *The Archbishop of Canterbury v. Tubb*, 101.

13. In an action by two plaintiffs, a plea that one of them became bankrupt after action brought, and before plea, cannot be pleaded, after the defendant has obtained an order for time to plead, upon the terms of pleading issuable. *Staples v. Holdsworth*, 298.

14. When further time to plead was given by the plaintiff's attorney, upon being served with a paper which purported to be a judge's summons for time to plead. *Held*, that the attorney was justified in signing judgment for want of a plea after he had discovered that no judge's summons had been issued. *Lowne v. Louder*, 55.

15. A plea of payment into court does not bind the defendant beyond the amount paid into court; and he may dispute the residue of the plaintiff's demand, as if non-assumpsit had been pleaded to it. *Lacey v. Walrond*, 215.

16. A writ of summons had been served in debt, and afterwards a declaration in assumpsit. The defendant did not apply to set aside the proceedings for irregularity, but the plaintiff having signed judgment in debt, for want of a plea, the Court set it aside, upon the ground that the defendant might have expected to receive notice of a writ of inquiry. *Cons v. Kirk*, 145.

17. The tenant having demanded a *rien in formedon* after a general imparlance, the demandant sued out a writ of grand cape. *Held*, that this was irregular, and that the demandant ought to have counter-pleaded or demurred. *Tolson v. Watson*, 113.

18. After the defendant had moved for the costs of the day against the plaintiff for not proceeding to trial, and three terms having again elapsed without any notice of trial, the defendant gave plaintiff's attorney notice that he intended to apply for judgment as in case of a nonsuit; the attorney said that he should not oppose the motion. Under these circumstances the Court granted a rule absolute for judgment as in case of a nonsuit. *Phillip v. Arden*, 13.

19. In a motion for judgment as in case of a nonsuit for not proceeding to trial, the affidavit is sufficient if it state that notice of trial was given, without stating that the cause was at issue. *Corbin v. Heyworth*, 305.

### V. PROCEEDINGS AFTER VERDICT.

20. The party who virtually succeeds in an action is entitled to the custody of the postea; therefore, where, in trespass, a verdict, with one



shilling damages, was found for the plaintiff on not guilty, and on an issue as to the property in the close; and a verdict for the defendant on an issue as to a right of way over the close, it was held, that the postea ought to have been delivered to the defendant. *Staley v. Long*, 144.

21. On the 6th of June, a judge's order was made by consent, which authorized plaintiff to sign final judgment immediately. On the 8th of June the defendant died, before the plaintiff had entered up his judgment. *Held*, that this was not a case in which the defendant was entitled to have judgment entered *nunc pro tunc*, under Reg. 3 Hil. T. 4 W. 4. *Vaughan v. Wilson*, 254.

## PRINCIPAL AND AGENT.

See TENDER, 1, 2.

1. The plaintiff, who was a stock-broker, sold for the defendant four Guatemala bonds, and paid him £298, the price for which they were sold. The vendee discovered, after two days, that the bonds were not stamped so as to make them saleable at the Stock Exchange, and he thereupon returned them to the plaintiff, who repaid the purchase-money without conferring with the defendant. The plaintiff did not disclose the defendant's name when he sold the bonds; and it appeared that stock-brokers were treated as principals, and were liable to be expelled from the Exchange if they failed in performing their contracts. *Held*, that the plaintiff was authorized to rescind the contract, and that an action for money had and received was sustainable by the plaintiff to recover back the £298, without declaring, upon an implied warranty by the defendant, that the bonds were saleable. *Young v. Cole*, 126.

2. The defendants employed an architect to draw plans for a workhouse, and the architect employed the plaintiff, a surveyor, to calculate the quantities of the materials. The defendants afterwards advertised for tenders to build the workhouse; and they gave notice, that copies of the quantities might be obtained, and that the successful competitor would be required to pay for calculating them. The defendants subsequently determined not to build the workhouse. In an action brought by the plaintiff against the defendants for work and labour, it was proved, that architects were accustomed to employ a surveyor to calculate the quantities. *Held*, that the action was maintainable, as the architect was the agent of the defendants, and had authority to bind them. *Moon v. the Guardians of the Witney Union*, 206.

PROMISSORY NOTE.—See BILL OF EXCHANGE.

## PUBLIC COMPANY.

See COVENANT, 1. EAST INDIA COMPANY.

Where it appeared, that the directors of the company, had given bills of exchange, accepted by one or more directors, before the defendants became directors; but, since that period, no such bills had been accepted; and the jury found, upon these and other facts, that there was no express authority given by the new directors to draw or accept bills, the Court refused to grant a new trial. *Bramah and another v. Roberts and others*, 191.

QUARE IMPEDIT.—See PLEADING, 22.

## REAL ACTION.

See INTRUSION, 1, 2, 3. LIMITATION, STATUTES OF, 3. PRACTICE, 17.

A count in a writ of right must shew, upon the face of it that the ancestor of the demandant had seisin of the tenements within sixty years from the teste of the writ. *Dumaday v. Hughes*, 33.

## REGULÆ GENERALES.

UPON WHICH DECISIONS ARE REPORTED.

Trin. T. 1 W. 4. (Bills of Exchange. Bail.)

*Henry v. Burbidge*, 16.  
*Vestris's Bail*, 129.

Hil. T. 2 W. 4. (Practice.)

*Knight v. Moore*, 1.  
*Holliday v. Laves*, 130.  
*Clarke v. Vestris*, 133.

Mich. T. 3 W. 4. (Indorsement on Writ.)

*Brashour v. Russell*, 242.

Hil. T. 4 W. 4. (Pleadings and Practice.)

*Cholmondeley v. Payne*, 80.  
*Perceval v. Connor*, 202.  
*Finleyson v. Mackenzie*, 211.  
*Vaughan v. Wilson*, 254.

Trin. T. 7 W. 4.

Hours of Business at the Offices, 234.

REPLEVIN.—See PLEADING, 25.

## SET-OFF.

In an action of assumpsit for money lent, the defendants pleaded, as a set-off, that by a memorandum in writing the plaintiff guaranteed to pay the defendant 1600*l.* money lent, and any further sums which they might advance to J. C;

and that, at the time of the suit, the plaintiff was indebted to the defendants, on the said guarantee, the said sum of 1600*l.*, and a further sum of 3000*l.* afterwards lent to J. C. *Held*, that this was not a debt which could be set-off against the plaintiff's demands, within 2 Geo. 2, c. 22, s. 13. *Morley v. Inglis*, 270.

SHERIFF.—See BILL OF EXCEPTIONS, 1, 2, 3.  
FALSE JUDGMENT. INSOLVENT. PRACTICE, 2.  
WRIT OF TRIAL, 1, 2, 3.

### SLANDER.

In an action for slander, by an attorney, the declaration stated, that the defendant published of and concerning the plaintiff, and of and concerning him, in the way of his profession, these words, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster;" it was in evidence, that the plaintiff was accustomed to bet at horse-races, and the jury found that the words were not spoken of him as an attorney, but that the slander had a tendency to injure him morally and professionally. A verdict was found for the plaintiff, and a rule nisi having been obtained to enter a nonsuit, the Court held, that the defendant was not entitled to a nonsuit, but they arrested the judgment. *D'Oyley v. Roberts*, 154.

### STAMP.

In ejectment by the assignee of a mortgagee against the tenant of the mortgagor, the lessor of the plaintiff proved a deed of assignment, which recited a mortgage of certain premises for 900 years as a security for 1500*l.*; and it was witnessed, that, in consideration of 1500*l.* paid to the mortgagee, he transferred the mortgaged premises to the lessor of the plaintiff, and the mortgagor, in consideration of 10*s.*, assigned, ratified, and confirmed the same. *Held*, that a stamp of 3*s.* was sufficient, the seisin of the mortgagor having been proved. *Doe d. Brame v. Maple*, 213.

### STATUTES

#### UPON WHICH DECISIONS ARE REPORTED.

West. 2, c. 31. (Bill of Exceptions.)

*Strother v. Hutchinson*, 294.

32 Hen. 8, c. 2. (Real Action.)

*Dumday v. Hughes*, 33.

*Piercy v. Gardner*, 103.

22 & 23 Car. 2, c. 10. (Administration.)

*Archbishop of Canterbury v. Tubb*, 101.

2 Geo. 2, c. 22. (Set-off.)

*Morley v. Inglis*, 270.

—— c. 23. (Attorneys.)

*Exparte Rice*, 130.

*Exparte Branson*, 132.

4 Geo. 2, c. 28. (Landlord and Tenant.)

*Wilkinson v. Hall*, 56.

7 Geo. 2, c. 20. (Mortgage.)

*Doe d. Capps v. Capps*, 136.

14 Geo. 3, c. 48. (Wagers.)

*Morgan v. Pebrer*, 3.

18 Geo. 3, c. lxxv. (Private Act. Canal.)

*Pontet v. Basingstoke Canal Company*, 46.

33 Geo. 3, c. xvi. (Private Act. Canal.)

*Pontet v. Basingstoke Canal Company*, 46.

43 Geo. 3, c. cxxvi. (Private Act. East India Dock.)

*East India Dock Company v. Baker*, 171.

48 Geo. 3, c. 123. (Prisoner.)

*Doe d. Daffey v. Sinclair*, 145.

55 Geo. 3, c. 184. (Stamp.)

*Doe d. Brame v. Maple*, 213.

3 Geo. 4, c. 126. (Turnpikes.)

*Oldroyd v. Crampton*, 261.

6 Geo. 4, c. 16. (Bankrupt.)

*Devas v. Venables*, 9.

*Skinners' Company v. Jones*, 18.

—— c. 94. (Factor's Act.)

*Jaulerey v. Britton*, 93.

7 Geo. 4, c. 57. (Insolvent Act.)

*Yapp v. Harrington*, 165.

9 Geo. 4, c. 14. (Limitations.)

*Bird v. Gammon*, 224.

1 Will. 4, c. 22. (Interrogatories.)

*Pole v. Rogers*, 83.

1 & 2 Will. 4, c. 32. (Game.)

*Bush v. Green*, 265.

## 2 Will. 4, c. 39. (Writ of Summons.)

*Abbots v. Kelly*, 32.*Brashour v. Russell*, 242.

## 3 &amp; 4 Will. 4, c. 15. (Dramatic Copyright.)

*Planché v. Braham*, 288.

## 3 &amp; 4 Will. 4, c. 27. (Limitations.)

*James v. Salter*, 70.

## c. 42. (Law Amendment.)

*Lindsay v. Wells*, 97.*Bowman v. Willis*, 137.

## c. 74, s. 85. (Acknowledgment.)

*Ex parte Stevens*, 13.*Ex parte Branson*, 132.

## 5 &amp; 6 Will. 4, c. 83. (Patent.)

*Bulnois v. M'Kenzie*, 251.

## 7 Will. 4 &amp; 1 Vict. (Attorney.)

*Downton v. Styles*, 306.

## STOCK-BROKER.—See PRINCIPAL AND AGENT, 1. WAGERS, 1, 2.

## TENDER.

1. In an action for non-delivery of shares sold by defendant's broker, the defendant pleaded that no tender of the price had been made; and issue was joined thereon. It appeared that the defendant was informed that a tender of the price had been made to his broker; and the defendant, in reply, without objecting that the broker was not his agent, said he would endeavour to make an arrangement for the delivery of the shares. *Held*, that this was sufficient evidence to prove the tender. *Jackson v. Jacob*, 219.

2. Whether a tender to a broker is good, *quære*. *Id.*

## TRESPASS.—See COSTS, 4. PLEADING, 20. PRACTICE, 7.

## TRIAL.—See ACTION, 1, 2.

## TROVER.

See PLEADING, 2. 21.

Where a box was given to an innkeeper to be kept until it was called for, and when inquiry

was made for it, the innkeeper's wife said, she supposed some of the carriers had taken it away by mistake. *Held*, that this was no evidence of a conversion, and that trover could not be maintained. *Williams v. Gessry*, 131.

## TURNPIKE.—See PLEADING, 23, 24.

## VARIANCE.—See PLEADING, 8, 17.

## VENDOR AND VENDEE.

See AGREEMENT.

1. A vendor, by an agreement in writing, contracted to sell the lease and good-will of a public-house; and one of the conditions was, that possession should be delivered on the 3d of May. *Held*, in an action brought by the vendee, to recover back his deposit, that parol evidence of an agreement between the parties, to waive the day which was stipulated, and to substitute another, was inadmissible, as being in contravention of the Statute of Frauds. *Stowell v. Robinson*, 197.

2. In an action for non-performance of a contract for the sale of a leasehold house, the declaration alleged that the defendant had not lawful right and title to sell and assign the lease at the time the contract was made. It was ascertained, after the sale, that the assignments of the lease to the vendor, and to former assignees, had not been registered; and also that the vendor was restrained from assigning without a license from the ground landlord; and that no such license had been obtained at the time the contract was made. *Held*, that neither of these objections impeached the validity of the vendor's title, as the defects were capable of being remedied. *Id.*

## VERDICT.—See COSTS, 4. PRACTICE, 20.

## WAGERS.

1. A wager relating to the value of foreign funds is not illegal at common law, and therefore an action was held to be maintainable to recover differences paid by the plaintiff on the depreciation of Spanish stock. *Morgan v. Pebrer*, 3.

2. The stat. 14 Geo. 3, c. 48, is only applicable to gambling transactions arising on policies of insurance. *Id.*

## WARRANT OF ATTORNEY.

The affidavit of the due execution of a warrant of attorney signed by a marksman, should shew that it was read over to him. It is not sufficient to state that it was duly executed. *Wraith v. Harris*, 240.

WARRANTY.—See PRINCIPAL AND AGENT, 2.

## WILL.

See EXECUTORS, 4. LIMITATION, STATUTES OF, 2.

A testator devised and bequeathed all his freehold estates, together with the use of his household goods, and live and dead stock, used in and about his said estates, unto Margaret S. for and during the term of her natural life, for her independent use and benefit, *remainder* to the husband of Margaret S. for life, remainder to the use of the heirs of the body of the said Margaret S. in tail, remainder to Alexander H. for life, with remainders over; and the testator declared that all the aforesaid settlements were intended by him to be in strict settlement with remainder to his own right heirs for ever. *Held*, that Margaret S. took an estate in tail general, in the testator's freehold estate. *Douglas v. Congreve and others*, 235.

WITNESS.—See ACTION, 1, 2. ATTORNEY, 6.

## WRIT OF TRIAL.

1. The Court refused to grant a new trial, in the Sheriff's Court, upon the ground that the under-sheriff refused to allow the defendant's attorney to cross-examine some of the plaintiff's witnesses, it appearing that the cross-examination was unnecessary. *Semble*, that the Court will not require an under-sheriff to make an affidavit of circumstances which occurred at the trial. *Power v. Horton*, 14.

2. A rule nisi having been obtained by the defendant, after a verdict for the plaintiff, to set aside a writ of trial, upon the ground that the date of the writ of summons was incorrectly stated, the Court suspended the rule to enable the plaintiff to apply for leave to amend the record. *Perceval v. Connor*, 202.

3. Where it appeared, by the return of the sheriff to a writ of trial, that it was executed a day after the return-day, an application was made by the unsuccessful party who had appeared at the trial, to set the writ aside; but the Court intimated that, in such a case, they would amend the return, if necessary. *Sherman v. Tinsley*, 32.

END OF THE VOLUME.



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